86-634

Supreme Court, U.S.
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No. 86-

In The Supreme Court of The United States

OCTOBER TERM, 1986

SANGUINE, LTD.,
Petitioner,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a restricted Indian, whose interests were represented in litigation by the United States, may, after post-judgment intervention, seek vacation of the final equitable judgment and decree previously entered, on the ground that the representation by the United States may have been less than adequate.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Bureau of Indian Affairs, the United States Geological Survey (now Bureau of Land Management), the Area Director of the Anadarko Area Office of the Bureau of Indian Affairs, in his official capacity, and the District Oil and Gas Supervisor for the Tulsa District Office of the United States Geological Survey (now District Manager for the Tulsa District Office of the Bureau of Land Management), in his official capacity, were appellees in the United States Court of Appeals for the Tenth Circuit. In addition, the following restricted Indian members of the Wichita and Affiliated Tribes of Oklahoma were appellees in the court of appeals: Delra M. Toohey; Mae Lamar Davis; Imogene Birch; Eva Louise Warden; Richard Guy; Wildena F. Guy Moffer; Willard B. Guy; Berdina Holder; and Ronnie F. Birch, Sr.

Sanguine, Ltd., has no subsidiaries, parent corporations, or affiliated corporations.

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SANGUINE, LTD.,
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vs.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Sanguine, Ltd. (Sanguine), petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit, rendered August 1, 1986, affirming an order of the United States District Court for the Western District of Oklahoma that vacated a final judgment and decree rendered on August 11, 1981.

OPINIONS BELOW

The opinion of the United States Court of Appeals (App. A, *infra*) is reported at 798 F.2d 389. The order of the United States District Court (App. B, *infra*) is not reported. A prior decision of the court of appeals (App. E, *infra*) is reported at 736 F.2d 1416. Prior orders of the district court (App. D, F, G and H, *infra*) are not reported.

JURISDICTION

Judgment of the court of appeals was entered on August 1, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a restricted Indian, whose interests were represented in litigation by the United States, may, after post-judgment intervention, seek vacation of the final equitable judgment and decree previously entered, on the ground that the representation by the United States may have been less than adequate.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions are set forth in App. J, *infra*.

STATEMENT OF THE CASE

A. Facts And Proceedings In The Case Prior To Intervention By The Restricted Indians

1. Sanguine commenced this action on July 9, 1981. Sanguine is an oil and gas exploration company. Defendants were the United States Department of the Interior and its subsidiary officers and agencies who are authorized by law to approve and supervise operations conducted under oil and gas leases on restricted Indian lands. 25 U.S.C. §§ 396, 396d. The litigation was initiated by Sanguine to challenge a specific federal rule adopted by the Anadarko Area Director of the Bureau of Indian Affairs concerning the "communitization" of oil and gas leases on restricted Indian lands.[1]

2. Communitization is designed to "pool" or "unitize" leases included within an approved drilling and spacing unit. Under a communitization agreement, operations conducted anywhere within a unit area are deemed to occur on each lease in the unit area. Because wells may not be drilled on each separate lease under federal and state well spacing requirements, communitization of separate leases into a single, efficient drilling unit is the only prudent and lawful manner in which mineral development operations can normally be conducted. Federal statutes and regulations applicable to oil and gas leases on restricted Indian lands

[1] "Restricted Indian lands" refers to those Indian lands that remain under the supervision and management of the Bureau of Indian Affairs and the United States Department of the Interior pursuant to 25 U.S.C. §§ 396 *et seq.* The term "restricted Indians" refers to persons whose lands are subject to such supervision and management by the United States government.

recognize this basic fact by authorizing the Secretary of the Interior to make all such leases subject to cooperative unit development and communitization plans. 25 U.S.C. § 396d; 25 C.F.R. § 212.24 (formerly § 172.24).

3. On April 10, 1981, the Anadarko Area Director of the Bureau of Indian Affairs adopted and announced a rule that thereafter required all lessees of restricted Indian lands, as a condition precedent to the submission of communitization agreements for his approval, to include within the proposed agreement a clause expressly *amending* the basic leases to provide that, even though a producing well had been drilled on the communitized unit, the leasehold estate in all non-producing communitized formations would terminate at the expiration of the primary term of the underlying leases. Pursuant to that Rule of April 10, 1981, the District Oil and Gas Supervisor of the United States Geological Survey returned several proposed communitization agreements to Sanguine without any consideration because they did not contain such a provision.

4. Sanguine brought its action against the United States Department of the Interior and its subsidiary agencies and officials in the United States District Court for the Western District of Oklahoma, seeking to enjoin the enforcement of the rule, invoking that court's original jurisdiction under 28 U.S.C. §§ 1331(a) and 1361. Testimony and exhibits presented at the evidentiary hearing on Sanguine's motion for a preliminary injunction established that the compelled waiver of preexisting lease rights required by the challenged

rule was contrary to the provisions of the affected leases and was invalid under federal administrative law and under the agencies' own regulations. The evidence also established that the economic injury to Sanguine alone from the enforcement of the rule would accumulate into the tens of millions of dollars.

5. On July 20, 1981, the district court entered an order preliminarily enjoining any enforcement of the rule. App. H, *infra*. The court determined that the rule was invalid because the Anadarko Area Director of the Bureau of Indian Affairs had no authority to adopt such a requirement, because the rule had been adopted in violation of the agency's mandatory notice and public comment requirements, and also because the rule compelled an improper, retroactive modification and waiver of preexisting lease rights. The defendants were preliminarily enjoined to approve communitization agreements under the routine and customary procedures employed prior to the unlawful adoption of the rule of April 10, 1981.

6. On August 11, 1981, the parties reached an agreement to settle and terminate the litigation. The government, by and through the United States Attorney, stipulated to the facts set forth in Sanguine's complaint and, consistently with the district court's preliminary decision, stipulated to the invalidity of the challenged rule as applied to leases issued prior to April 10, 1981, in which Sanguine held an interest. The parties also submitted a proposed consent decree to the court as a final judgment. On August 11, 1981, the district

court entered the consent decree as its final order, permanently enjoining the enforcement of the rule and declaring it invalid as applied to leases issued prior to April 10, 1981. App. G, *infra*. The court also ordered the government to approve communitization agreements submitted by Sanguine under the routine and customary procedures employed prior to the unlawful adoption of the rule. At least forty-five (45) leases were thereafter communitized pursuant to the district court's orders.

7. More than a month after the final decree and permanent injunction had been entered by the district court, several restricted Indians moved to intervene in the action. *See*, note 1, *supra*. They alleged that they were lessors of unspecified leases subject to the management and supervision of the federal government. Both Sanguine and the United States opposed the proposed postjudgment intervention. The district court denied the motion to intervene, holding that the restricted Indians had failed to show that their interests were inadequately represented by the United States. App. F, *infra*.

8. The restricted Indians appealed to the United States Court of Appeals for the Tenth Circuit. The court of appeals held that the district court had applied the wrong standard for determining the right to intervene, holding that the restricted Indians had only a "minimal burden of showing that the government's representation of [the restricted Indians'] interests may have been inadequate." 736 F.2d 1416, 1419. *See* App. E, *infra*.

B. Proceedings After Intervention

9. On remand, the district court entered its order permitting the restricted Indians to intervene. App. D, *infra*. Intervenors thereafter filed an answer in the action, waiving their right to appeal on the merits of the action. Intervenors also asserted "counterclaims" against Sanguine, the United States Department of the Interior and the Bureau of Indian Affairs. Intervenors requested the district court to vacate its orders of July 20, 1981, and August 11, 1981, to declare that the rule adopted April 10, 1981, was valid, to declare that any communitization agreement approved under the district court's orders was null and void, to declare that various unidentified leases had expired, and to award damages against Sanguine for an unspecified breach of contract and against the United States for breach of fiduciary duty.

10. Upon intervenors' application, the district court vacated its 1981 decrees on April 22, 1985. App. B, *infra*. The district court concluded that it was compelled to vacate its prior final order as a necessary result of the decision of the court of appeals permitting postjudgment intervention. *See* App. C, *infra*. The district court certified its order for immediate appeal, however, pursuant to 28 U.S.C. § 1292(b). In addition, because the vacated orders constituted and included mandatory injunctions, Sanguine appealed as of right pursuant to 28 U.S.C. § 1292(a)(1). The court of appeals granted Sanguine's Petition for Permission to Appeal on January 13, 1986, and consolidated the discretionary appeal with the appeal as of right.

11. On August 1, 1986, the court of appeals affirmed the district court's order vacating the 1981 decrees. App. A, *infra*. The court of appeals rejected Sanguine's argument that a restricted Indian is not entitled to vacate a final decree after postjudgment intervention when the United States was a party to the suit.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is in direct conflict with prior decisions of this Court. It also establishes a rule that would make finality impossible in decisions affecting federal management of restricted Indian lands, a matter of special importance in the development of federally-managed mineral resources.

I. REPRESENTATION OF RESTRICTED INDIAN INTERESTS BY THE FEDERAL GOVERNMENT IS BINDING UPON THE INDIANS

With no mention of the applicable precedent, the court of appeals has determined that restricted Indians may relitigate a final decree rendered against the United States while the United States represented the Indians' interests. This Court has clearly held, however, that litigation by the United States is binding upon restricted Indians.

In Heckman v. United States, 224 U.S. 413 (1912), this Court held:

There can be no more complete representation than that

> on the part of the United States in acting on behalf of these dependents, whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indians' acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty.

Id. at 444-45. In *Heckman* the United States was seeking to set aside certain conveyances made by restricted Indians. The Court rejected the contention that the Indians were necessary parties to the litigation, because, having adopted a rule precluding relitigation by the Indians, the grantees could not possibly be subject to double litigation:

> And it could not, consistently with any principle, be *tolerated* that, after the United States, on behalf of its wards, had invoked the jurisdiction of its courts to cancel conveyances in violation of the restrictions prescribed by Congress, these wards should themselves be permitted to relitigate the question.

Id. at 446 (italics supplied).

In the instant case, the United States attempted to enforce a federal rule promulgated pursuant to its management authority over restricted Indian lands. The district court held that the federal rule was unlawful and permanently enjoined enforcement of the rule in litigation in which the United States and its agencies appeared. In its representation, the United States was representing no interest other

than that of its duty and responsibility as manager and supervisor of restricted Indian lands. There could be no more complete representation of Indian interests than that of the United States in attempting to preserve the validity of a rule promulgated for the benefit of the Indians. As this Court has expressly held, restricted Indians are bound by that representation and may not seek to relitigate the prior decree.

II. RESTRICTED INDIANS MAY NOT RELITIGATE MATTERS SETTLED PRIOR TO THEIR INTERVENTION WHEN THE FEDERAL GOVERNMENT HAS BEEN REPRESENTING THEIR INTERESTS

The specific question addressed in this petition — whether restricted Indians may relitigate matters resolved prior to their intervention — has been considered on two prior occasions by this Court. *See Arizona v. California*, 460 U.S. 605 (1983); *Nevava v. United States*, 463 U.S. 110 (1983). The court of appeals ignored the dictates of these decisions in this case.

Arizona v. California was an original action in this Court to determine rights to waters of the Colorado River. The United States, representing five Indian tribes, acquired water rights for the Indians. The restricted Indians, who became dissatisfied with government representation, sought to intervene in the action, and requested a modification of the Court's 1964 interlocutory decree establishing a division of the water, and its 1979 supplemental decree identifying

the priority of perfected interests. This Court granted intervention, saying: "[I]t is obvious that the Indian Tribes, at a minimum, satisfy the standards for permissive intervention set forth in the Federal Rules [of Civil Procedure]. The Tribes' interests in the water of the Colorado Basin have been and will continue to be determined in this litigation since the United States' action as their representative will bind the Tribes to any judgment." 460 U.S. at 615-16.

The Court then addressed the issue of whether the Indians, having been permitted to intervene, should also be allowed to relitigate issues previously decided.[2] The Court rejected the Indians' attempt to relitigate previously decided issues, however, saying:

> First, while the technical rules of preclusion are not strictly applicable, the principles upon which these rules are founded should inform our decision. It is clear that res judicata and collateral estoppel do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment. Nevertheless, a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive.

Id. at 619 (citations omitted).

> In no context is this more true than with respect to rights in real property . . . . Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered open.

Id. at 620 (footnote omitted).

[2] The Court had expressly reserved the right to make modifications in its prior decree. 460 U.S. at 619.

> Finally, the *absence* of the Indian Tribes in the prior proceedings in this case *does not dictate or authorize relitigation* of their reserved rights. As a fiduciary, *the United States had full authority to . . . bind them in litigation. Heckman v. United States,* 224 US 413, 56 L Ed 820, 32 S Ct 424 (1912).
>
> 20. Contrary to the dissent . . . *Heckman's* square holding that the United States representation of Indian claims is binding . . . has not been undermined, let alone "repudiated," by subsequent cases . . . If these cases are at all relevant, it is to suggest that in an appropriate case *the Tribes' remedy for inadequate representation by the government may lie in the Court of Claims.*

Id. at 626-27 and n.20 (italics supplied).[3]

Shortly after the *Arizona* case was decided, the Court rendered its opinion in *Nevada v. United States*, 463 U.S. 110 (1983). In that case, the Court again held that restricted Indians may not intervene and then seek to relitigate previously decided issues. The Court first held that the United States was bound by the decree entered in a case wherein the United States had represented the interests of the Indians prior to their intervention. The Court then stated:

> We also held that the Tribe, whose interests were repre-

[3] These remarks could not be more apt than in the case at bar. The district court decided preliminarily on July 20, 1981, after hearing evidence, that the challenged rule was invalid. The United States then consented to a final decree incorporating the judge's legal determination. More than thirty days thereafter, on the date intervention was sought, over $2,000,000.00 had been spent by Sanguine in operations conducted pursuant to the final decree. Sanguine manifestly had a right to rely upon the district court's orders. Intervenors should not be allowed to have the communitization agreements, approved by the Secretary pursuant to court order, declared null and void.

> sented in *Orr Ditch* by the United States, can be bound by the *Orr Ditch* decree. This Court left little room for an argument to the contrary in *Heckman v. United States*, where it plainly said that "it could not, consistently with any principle, be tolerated that, after the United States on behalf of its wards had invoked the jurisdiction of its courts . . . these wards should be permitted to relitigate the question." We reaffirm that principle now.

Id. at 135, quoting *Heckman v. United States,* 224 U.S. 413, 446 (1912) (italics supplied, citations omitted).

Not only did the Court expressly state in the *Nevada* case that the restricted Indians were absolutely bound by the decree rendered while the government was *in a position to represent their interests,* but it further emphasized that the restricted Indians would have no right to challenge the benefits received by other parties in the prior proceedings. The Court said:

> In this case, the Tribe, *through the Government as their representative,* was given adequate notice and a full and fair opportunity to be heard. *If in carrying out their role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties.*

463 U.S. at 144 n.16 (italics supplied). Justice Brennan reemphasized that holding in his concurring opinion, wherein he explicitly stated that his understanding of the Court's opinion was that the Indians were precluded from regaining the rights the United States had failed to protect for them, but that the Indians would be entitled to pursue a claim for compensatory damages against the United States. *Id.* at 145.

The decisions of this Court clearly prevent restricted Indians from challenging decrees rendered against the United States in their absence. The court of appeals therefore should have reversed the district court's decision to vacate the 1981 decrees, which are incontrovertably final and binding upon the United States. Under the reasoning of this Court in the *Nevada* decision, the court of appeals may, however, permit the intervenors to litigate the cross-claims they have filed in this action against the United States. This judicial avenue remains open to intervenors and they have taken advantage of it by requesting an award of damages against the United States for an alleged breach of fiduciary duty. This Court's opinions make clear, however, that intervenors may not supplement their action against the United States by also challenging the prior district court decrees or by seeking, as they do here, relief against private parties who have acted in reliance upon the district court's final orders. *See* note 3, *supra.*

III. INTERVENORS IN GENERAL ARE NOT PERMITTED TO RELITIGATE PRIOR DECREES

The rule that restricted Indians cannot challenge decrees entered in litigation affecting their restricted lands in which the United States is a party is a long-standing and well-established rule. This rule is, moreover, simply a particular manifestation of the broader rule that an intervenor may not challenge any decree entered prior to his intervention, even when his interests are not being represented by anyone.

In *Galbreath v. Metropolitan Trust Co.*, 134 F.2d 569 (10th Cir. 1943), the court of appeals stated the following rule, which remains the applicable precedent in that circuit:

> [O]ne who intervenes in a suit in equity thereby becomes a party to the suit, and is bound by all prior orders and adjudications of fact and law as though he had been a party from the commencement of the suit.

Id. at 570. The *Galbreath* case was decided under the Federal Rules of Civil Procedure. Under the former Equity Rules, which governed intervention prior to the adoption of the Federal Rules of Civil Procedure in 1938, this Court had stated that the "settled rule of practice [was] that intervention [would] not be allowed for the purpose of impeaching a decree already made." *United States v. California Co-operative Canneries,* 279 U.S. 553, 556 (1929). The court in *Hartley Pen Co. v. Lindy Pen Co.,* 16 F.R.D. 141 (S.D. Cal. 1954), described the Federal Rules of Civil Procedure as having liberalized the status of an intervenor, but noted that nonetheless the intervenor "must join subject to the proceedings that have occurred prior to his intervention; he cannot unring the bell." *Id.* at 153.

The same rule applies even though the prior decree was entered with the consent of the original litigants. In *Siebring v. Hansen,* 346 F.2d 474 (8th Cir. 1965), the court held that an intervenor was fully bound by a consent decree entered into by the original litigants prior to his intervention, because a consent decree is a judicial act which possesses the same force and character as a judgment rendered after a fully con-

tested trial. Many other courts have followed the rule that prior equitable decrees are fully binding upon an intervenor. *See, e.g., Yankton Sioux Tribe v. Nelson,* 604 F. Supp. 1146 (D.S.D. 1985); *Moore v. Tangipahoa Parish School Bd,* 298 F. Supp. 288 (E.D. La. 1969); *Stell v. Savannah-Chatham County Bd. of Educ.,* 255 F. Supp. 88 (S.D. Ga. 1966); *United States v. The Audrey II,* 185 F. Supp. 777 (N.D. Cal. 1960); *Hartley Pen Co. v. Lindy Pen Co.,* 16 F.R.D. 141 (S.D. Cal. 1954); *Godfrey L. Cabot Inc. v. Binney & Smith Co.,* 46 F. Supp. 346 (D.N.J. 1942).

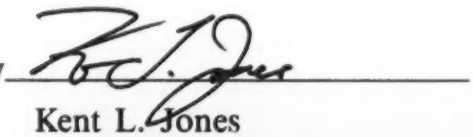
Under the established precedents of the lower federal courts and of this Court, the intervenors may not attack and seek to relitigate the merits of the final decrees entered in the district court. In particular, the intervenors may not summon the 1981 rule back from the dead and impose it upon the leases Sanguine has communitized and developed pursuant to the district court's prior decrees. The sole proper course open to intervenors at this time is the one specifically endorsed by this Court in *Nevada v. United States.* The remedy of a restricted Indian intervening after an adverse adjudication "is against the Government, not against third parties." 463 U.S. at 144 n.16. The decision of the court of appeals in this case would, however, render the government's representation meaningless and would prevent finality in the adjudication of the lawfulness of rules adopted by the federal government as the manager of restricted Indian lands.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HALL, ESTILL, HARDWICK,
GABLE, COLLINGSWORTH &
NELSON, INC.

By 

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ATTORNEYS FOR
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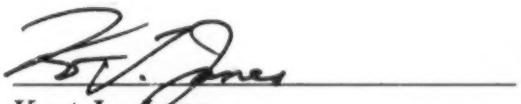
CERTIFICATE OF SERVICE

I hereby certify that this Petition for Writ of Certiorari was served upon the parties hereto this 15th day of October, 1986, by depositing three copies in the United States mails, with first-class postage prepaid, addressed as follows:

1. United States Department of the Interior, c/o Solicitor General, Department of Justice, Washington, DC 20530;
2. United States Department of the Interior, c/o Secretary of the Interior, Main Interior Building, 18th and C Streets, N.W., Washington, DC 20240;
3. Bureau of Indian Affairs, c/o Solicitor General, Department of Justice, Washington, DC 20530;
4. Bureau of Indian Affairs, 1951 Constitution Ave., N.W., Washington, DC 20245;
5. Bureau of Land Management, c/o Solicitor General, Department of Justice, Washington, DC 20530;
6. Bureau of Land Management, 1725 "I" Street, N.W., Premier Building, Washington, DC 20240;
7. Area Director, Anadarko Area Office, Bureau of Indian Affairs, c/o Solicitor General, Department of Justice, Washington, DC 20530;
8. Area Director, Anadarko Area Office, Bureau of Indian Affairs, P.O. Box 368, Anadarko, OK 73005;
9. District Manager, Tulsa District Office, Bureau of Land Management, c/o Solicitor General, Department of Justice, Washington, DC 20530;
10. District Manager, Tulsa District Office, Bureau of Land Management, 9522-H East 47th Place, Tulsa, OK 74145;

11. Delra M. Toohey, Mae Lamar Davis, Imogene Birch, Eva Lois Warden, Richard Guy, Wildena F. Guy Moffer, Willard B. Guy, Berdina Holder, Ronnie F. Birch, Sr., c/o Patricia L. Brown, Wilkinson, Barker, Knauer & Quinn, 1735 New York Ave., N.W., Washington, DC 20006.



Kent L. Jones

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SANGUINE, LTD., Plaintiff-Appellant, vs. UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS, UNITED STATES GEOLOGICAL SURVEY, STANLEY SPEAKS, and F. L. STELZER, Defendants-Appellees, DELRA M. TOOHEY, MAE LAMAR DAVIS, IMOGENE BIRCH, EVA LOUISE WARDEN, RICHARD GUY, WILDENA F. GUY MOFFER, WILLARD B. GUY, BERDINA HOLDER, and RONNIE F. BIRCH, SR., Defendants in Intervention-Appellees.	Filed in the United States Court of Appeals, Tenth Circuit August 1, 1986 Nos. 85-1645 86-1121

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. CIV-81-917-E)

Kent L. Jones (Orval E. Jones with him on the briefs) of Hall, Estill, Hardwick, Gable, Collingsworth & Nelson, Inc., Tulsa, Oklahoma, for Plaintiff-Appellant.

Laura E. Frossard, Attorney, Department of Justice, Washington, D.C. (F. Henry Habicht II, Assistant Attorney General, and Edward J. Shawaker, Attorney, Department of Justice, Washington, D.C., and J. McLane Zanone, of Counsel, Attorney, United States Department of Interior, Washington, D.C., with her on the brief), for Defendants-Appellees.

Patricia L. Brown of Wilkinson, Barker, Knauer & Quinn, Washington, D.C. (Jap W. Blankenship, of Counsel, of Fellers, Snider, Blankenship, Bailey & Tippens, Oklahoma City, Oklahoma, with her on the brief), for Defendants in Intervention-Appellees.

Before BARRETT, MOORE, and BALDOCK, Circuit Judges.

MOORE, Circuit Judge.

This is an appeal from an order granting the intervenors' motion to vacate a judgment entered prior to intervention. The case presents the question of whether an intervenor whose interests were inadequately represented by a party defendant prior to intervention may seek to vacate decrees entered before intervention was granted. We hold that the circumstances of this case make mandatory the vacation of those decrees, and we affirm.

The genesis of this action was a rule adopted by the Anadarko Area Director of the Bureau of Indian Affairs

(BIA) to require the renegotiation and amendment of all expiring non-producing oil and gas leases on trust or restricted lands within his jurisdiction to provide: "any non-producing zones shall be released at the end of the primary term of said lease." Although existing leases previously had been extended by communitization[1] which lessees deemed economically necessary, the rule changed the lease forms to require their renegotiation regardless of communitization.

Plaintiff Sanguine, Ltd. (Sanguine), an oil and gas exploration company, filed this action to contest the rule. Defendants were the United States Department of Interior, as parent agency of the BIA, and others. No Indian landowners or lessors were made parties, although their interests were nominally represented by the government. Sanguine sought a preliminary injunction staying the implementation of the rule against certain of its leases which were about to expire. Sanguine alleged it would have to forfeit certain lease rights unless drilling operations were immediately commenced. After a hearing on the motion during which counsel for the government defendants agreed the Area Director's actions were unlawful[2] and essentially consented to the relief, the district court granted the injunction. Thereafter, the parties entered into a settlement of the suit stipulating the

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[1]"Communitization" is a form of pooling of leases within an approved drilling and spacing unit which results in economic advantages not otherwise available to lessees. Additionally, production anywhere within the unit extends the duration of any lease within the unit beyond the primary term.

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[2]*See Sanguine, Ltd. v. United States Dept. of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984).

rule and the lease form required by the rule were invalid and could not be applied to Sanguine's leases. Based upon that stipulation, the court then entered a consent decree declaring the rule invalid and permanently enjoining its enforcement against Sanguine. The decree further required the defendants to approve communitization agreements submitted by Sanguine in the form used prior to adoption of the rule.

Thereafter, nine members of the Wichita and Affiliated Tribes of Oklahoma, owners of restricted Indian lands and lessors to Sanguine, filed a motion to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2). The motion was denied, and the intervenors appealed. We held the denial of the motion to intervene was improper and reversed. *Sanguine, Ltd. v. United States Department of Interior,* 736 F.2d 1416 (10th Cir. 1984) (*Sanguine I*). We decided that intervention was proper because the government not only inadequately represented the Indian lessors whose interests were entrusted to it but also "in effect conceded the case at the outset." *Id.* at 1419[3] We further held the intervenors had vested interests in the subject of the suit sufficient to justify intervention. With these holdings, we reversed the order denying the motion to intervene, remanded the case, and directed intervention.

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[3]Sanguine attempts to finesse this holding by stating in its opening brief that we simply held the trial court had "applied the wrong standard for determining the right to intervene." This is not the import of the case. Although we did not question whether the government violated its trust duty, we found it did not represent the lessor's interests in conceding the case.

Upon remand, the intervenors moved to vacate the consent decree and permanent injunction. The district court, interpreting our holding in *Sanguine I* to mandate the vacation of its prior orders, granted the intervenors' motion to allow the case to proceed on its merits. This appeal followed.

Sanguine contends the trial court's determination was erroneous for three reasons. First, the intervenors could have timely sought an appeal from the initial consent decree but chose not to do so. Second, as a matter of law, an order granting intervention does not include the right to relitigate the merits of prior orders. Third, as a parallel, Sanguine argues the intervenors do not have the right to contest the validity of prior decrees. We do not find these arguments compelling.

Sanguine offers no authority supporting its claim that the intervenors who were not parties to the proceedings could have appealed the original order. Moreover, given the posture of this case, the argument begs the issue.

We held in *Sanguine I* intervention should have been granted as a matter of right. The only issue now is what effect that intervention has on the pendency of the case. To state the question in a different form: if the district court did not vacate its prior orders, of what value is the right of intervention we held exists in this case? Left unaffected, the prior orders resolved the validity and enforceability of the rule. Yet, these precise issues, we stated in *Sanguine I,* were of sufficient interest to warrant intervention.

To buttress its argument that the intervenors could not challenge orders entered prior to intervention, Sanguine cites two cases: *Arizona v. California,* 460 U.S. 605 (1983), and *Nevada v. United States,* 463 U.S. 110 (1983). Neither case is apposite.

In *Arizona,* the Supreme Court held that Indians who were permitted to intervene in an original proceeding in which their interests were previously represented by the government could not relitigate a factual question determined thirty years prior to intervention. The Court held the intervenors' interests had been adequately represented by the government; thus, they were bound by the prior adjudication. The Court reached the same conclusion in *Nevada,* holding res judicata barred relitigation of water rights previously determined in a proceeding in which the intervenors had been adequately represented by the United States. Those cases are readily distinguished by the adequacy of the representation afforded the intervenors.

As we noted in *Sanguine I:*

> Given appellants' interest in enforcing the challenged ruling, it is clear that they are so situated that the consent decree "may as a practical matter impair or impede" their ability to protect that interest. The consent decree enjoins the government from [enforcement of the rule], and we perceive no means by which appellants could compel the government to violate the decree. Moreover, . . . judicial review of agency action may as a practical matter afford the applicant much less protection than the opportunity to participate in the proceedings to uphold the agency actions in the first place.

Sanguine, 736 F.2d at 1420 (citations omitted). Since the government did not contest Sanguine's challenge of the rule and the issues essential to the intervenors were resolved by consent decree and not adversary litigation, this case presents a unique situation in which prejudice to the intervenors can be avoided only by setting aside the prior judgment and allowing the opportunity to litigate the merits of the case.

It must be noted that these issues have not been "litigated" in the true sense; therefore, we are not faced with a "relitigation" of the prior decree. Since the intervenors were not adequately represented in the first instance, the principle of res judicata does not apply to them. *Parklane Hoisery Co., Inc. v. Shore,* 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.") *O'Hare v. General Marine Transport Corp.,* 740 F.2d 160, 167 (2d Cir. 1984), *cert. denied,* 105 S. Ct. 1181 (1985). The import of *Sanguine I* is to provide the intervenors with a full hearing on issues affecting their valuable property rights, and the district court properly balanced the competing interests to effect this purpose.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SANGUINE, LTD., Plaintiff,	)	Filed August 22, 1985
v.	)	CIV-81-917-E
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	)	
DELRA M. TOOHEY, *et al.*, Defendant Intervenors.	)	

ORDER

Upon the Intervenors' "Motion to Vacate Orders and to Dismiss the Complaint or, in the Alternative, to Vacate Orders and Compel Plaintiff to Join as Parties Defendant in this Action All Indian Lessors of Leases Subject to the Complaint," having heard argument from counsel for each party, and having read the briefs and after due consideration of the same, for the reasons stated in open court on March 28, 1985, it is this 22 day of April 1985, hereby:

ORDERED that the orders entered in this action on July 20, 1981 and August 11, 1981, are hereby VACATED.

IT IS FURTHER ORDERED that consideration of all other pending motions and grounds for relief shall be deferred until the Plaintiff, Sanguine, Ltd., shall have the opportunity to appeal the instant Order. If the instant Order does not constitute an order appealable as of right pursuant to 28 U.S.C. § 1292(a)(1), then, in that case, this Court expressly states that, for the reasons stated in open court on March 28, 1985, it is of the opinion that, under 28 U.S.C. § 1292(b), this Order vacating the Court's orders of July 20, 1981, and August 11, 1981, involves a controlling question of law as to which there is substantial ground for difference of opinion, and further that an immediate appeal from this Order may materially advance the ultimate termination of this litigation.

IT IS FURTHER ORDERED that proceedings in this Court shall be stayed pending the disposition of the appeal of this Order.

/s/ Luther B. Eubanks
JUDGE OF THE UNITED STATES
DISTRICT COURT

APPROVED AS TO FORM:

WILKINSON, BARKER, KNAUER & QUINN

By: /s/ Patricia L. Brown
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ATTORNEYS FOR SANGUINE, LTD.

UNITED STATES ATTORNEY
WILLIAM S. PRICE

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ATTORNEYS FOR DEFENDANTS

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SANGUINE, LTD., Plaintiff,	)	
vs.	)	
UNITED STATES DEPARTMENT OF INTERIOR, *et al.*, Defendants,	)	
DELRA M. TOOHEY, *et al.*, Defendants in Intervention.	)	No. CIV-81-917-E

OFFICIAL COURT REPORTER'S TRANSCRIPT
OF PROCEEDINGS HAD
ON MARCH 28, 1985
BEFORE THE HONORABLE LUTHER B. EUBANKS
IN OKLAHOMA CITY, OKLAHOMA

APPEARANCES

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and

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* * *

THE COURT: Well, let me ask the young lady, can you find any language in the Circuit opinion in this very case wherein I was reversed that might telegraph the idea of the Circuit Court as to what I should do here on remand?

I read, and I'm looking at 1420, the very last paragraph. Well, I will take it outside of the ordering paragraph to reverse.

Let me quote. It's on page 1420, and it's 736 Federal Second. "Given appellant's interest in enforcing the challenged ruling, it is so clear that they are so situated that the consent decree may as a practical matter impair or impede their ability to protect that interest." And it goes ahead. Consent decree enjoins the government and so forth.

And that seems to tell me without specifically saying so, I ought to get that thing out of the way so that the government, your client, can deal with everybody as a brand new problem without any binding precedents having been lain.[1]

* * *

MS. BROWN: I think the government attorney pointed out the relevant language when it's clear that what the Tenth Circuit had in mind was that we are going to come back here and we were going to get our chance to be heard, and we can't do that if Sanguine —

THE COURT: I agree with that completely. I don't know where it puts us, but I don't think that the Circuit intended to reverse and say let's let them intervene, and then immediately kick them out, because the law of this case has already barred them from any kind of recovery.

I don't believe the Circuit intended that at all.[2]

* * *

[1]Page 21 line 18 to page 22 line 10.

[2]Page 32 lines 15 to 25.

THE COURT: No. I think that I have decided already what should be done now, and just go ahead and take your seat.

I'm going to vacate that order, and I will not remand, although I think that should be done, until we have had some clarification, and I guess the only way to do it is through an appeal; clarification from the Appeals Court of exactly what rights the intervenors have once they get in here.

MR. JONES: Yes, Your Honor.

THE COURT: And if the order that I'm about to make and am making, that is to vacate my order of the consent decree that was entered back in 1980 or '81, if that is not an appealable order, then I will certify the question and ask the Court of Appeals to take it and spell out in more detail precisely what they expect us to do on remand.

MR. JONES: Your Honor, I would ask that you enter such a certification for that purpose.

THE COURT: I think I should. I don't want to delay this case anymore, but there is no use in us going through a lot of procedures on remand or here. And if your argument is correct, and I'm inclined to believe you're in error, but your argument is not lightly made. I know that, and he could be correct. So I think we ought to get it out of the way and find out precisely whether or not that was a final, binding order and binding on both intervenors and the original parties.

In other words, get the questions decided by the higher

Court of whether or not I'm now in error in vacating the consent decree.

MR. JONES: Thank you, Your Honor.

THE COURT: If I am in error, then the rest of this case is easy. If I'm acting properly in vacating then we've got a new ballgame, and send it to the administrative agency.

But we will not do it until we find out.

MR. JONES: Do you want our argument on the motion for summary judgment?

THE COURT: I don't think so, because that is so closely intertwined with what we're doing here.

MR. JONES: I recognize that, and I ask only that —

THE COURT: We got to get it clarified. I will say this: that if I'm in error in vacating that decree, I'm also probably going to have to automatically grant your motion for summary judgment, but I'm inclined to believe you're in error.

(At this point in the proceedings, the reporter's stenograph machine completely stopped working. After obtaining another machine, the Court made the following comments.)

THE COURT: Make the order an appealable order. If my order vacating this 1981 consent decree is not automatically appealable. Then I want to certify it for an interlocutory appeal and will do so.[3]

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[3]Page 39 line 25 to page 42 line 1.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SANGUINE, LTD.,	)	Filed July 13, 1984
Plaintiff,	)	
	)	
vs.	)	CIV-81-917-E
	)	
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,	)	
	)	
Defendants,	)	
DELRA M. TOOHEY, *et al.*,	)	
Defendant Intervenors.	)	

ORDER

Upon consideration of the motion of Delra M. Toohey, *et al.*, to file an Answer to the Complaint, and considering the June 15, 1984, decision of the United States Court of Appeals for the Tenth Circuit on this matter, it is hereby

ORDERED that leave is granted to movants to file their Answer herein as intervening defendants.

Dated this 13 day of July, 1984.

/s/ Luther B. Eubanks
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS

TENTH COURT

SANGUINE, LTD., Plaintiff-Appellee, vs. UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, UNITED STATES GEOLOGICAL SURVEY, STANLEY SPEAKS, and F. L. STELZER, Defendants-Appellees, DELRA M. TOOHEY, MAE LAMAR DAVIS, IMOGENE BIRCH, EVA LOIS WARDEN, RICHARD GUY, WILDENA F. GUY MOFFER, WILLARD B. GUY, BERDENA HOLDER and RONNIE F. BIRCH, SR., Movants-In-Intervention Appellants.	Filed United States Court of Appeals, Tenth Circuit June 15, 1984 No. 82-1030

Appeal from the United States District Court
For the Western District of Oklahoma
(D. C. No. CIV-81-917-E)

Patricia L. Brown (John Michael Facciola, also of Wilkinson, Cragun & Barker, Washington, D.C., and Jap W. Blankenship of Fellers, Snider, Blankenship, Bailey and Tippens of Counsel with her on the brief) for Appellants.

Kent L. Jones (James C. T. Hardwick, and Mark K. Blongewicz with him on the brief) of Hall, Estill, Hardwick, Gable, Collingsworth & Nelson, Tulsa, Oklahoma, for Plaintiff-Appellee Sanguine, Ltd.

Thomas H. Pacheco, Attorney, Department of Justice, Washington, D.C. (Carol E. Dinkins, Assistant Attorney General, John E. Green, Acting United States Attorney, Oklahoma City, Oklahoma, Roger Stuart, Assistant United States Attorney, Oklahoma City, Oklahoma, and Laura Frossard, Attorney, Department of Justice, Washington, D.C., on the brief) for Defendants-Appellees.

Before DOYLE and LOGAN, Circuit Judges, and CHILSON, District Judge*

LOGAN, Circuit Judge.

This is an appeal from the district court's denial of a motion for intervention as of right under Fed. R. Civ. P. 24 (a)(2) and for permissive intervention under Fed. R. Civ. P. 24(b). Because we hold that appellants were entitled to intervene as of right, we do not discuss the permissive intervention issue.

Appellants, nine members of the Wichita and Affiliated Tribes of Oklahoma, own restricted Indian lands in western

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*The Honorable Hatfield Chilson, Senior United States District Judge for the District of Colorado, sitting by designation.

Oklahoma. Pursuant to its trust responsibilities to Indians, the United States, through the Department of Interior, oversees and must approve all oil and gas leases on restricted Indian lands. 25 U.S.C. § 396a. With the approval of the Bureau of Indian Affairs (BIA), sometime before April 10, 1981, appellants leased their lands to Sanguine, Ltd., an oil and gas exploration company. Each lease grants Sanguine the right to drill for and extract oil and gas from the land for a specified term of years and as long thereafter as oil and gas are produced from the land in paying quantities.

The Secretary of Interior may subject leases on Indian lands to "any reasonable cooperative unit or other plan" for oil and gas production. 25 U.S.C. § 396d. Each lease between Sanguine and an appellant provides that the parties will abide by any cooperative or unit agreement that is adopted by a majority of operating interests in the unit and approved by the Secretary. The unit development plan most common for restricted Indian lands in western Oklahoma is a "communitization" agreement. This type of agreement pools or communitizes all oil and gas production from leases within an area established by the Oklahoma Corporation Commission as a drilling and spacing unit for one well. The agreement provides that production anywhere within the unit is deemed produced from each lease within the unit. Thus, production anywhere within the unit will extend the duration of any lease within the unit beyond its primary term.

This appeal arises from a suit that Sanguine filed against the Department of Interior and some of its subsidiary

agencies and officials (hereafter the "government"). Sanguine alleged that before April 10, 1981, the BIA routinely approved a form of communitization agreement (the "Standard Form" agreement) under which production of oil and gas in paying quantities from any zone within the unit is deemed produced from every zone on every lease within the unit. On April 10, 1981, however, Stanley Speaks, Anadarko Area Director of the BIA, announced that the BIA would only approve communitization agreements submitted on the "Rev. April 1981 Form." That form provides, "All Trust or Restricted Leases committed by this agreement are hereby amended to provide that any non-producing zones shall be released at the end of the primary term of said lease." Sanguine had not yet entered into communitization agreements for its leases with appellants when Speaks made this announcement. Thus, Sanguine filed suit, seeking a declaration that Speaks' ruling requiring use of the Rev. April 1981 Form was unlawful and an injunction against enforcement of Speaks' ruling.

After a hearing on Sanguine's motion for a preliminary injunction, the district court issued an order on July 20, 1981, declaring that Speaks' ruling was unlawful because (1) it was adopted in violation of public notice and comment procedures required for rulemaking; (2) it constituted an improper retroactive modification of Sanguine's leases; and (3) Speaks acted beyond the scope of his delegated authority in adopting the rule. The court enjoined the government defendants from requiring Sanguine to use the Rev. April 1981 Form

and ordered them to approve communitization agreements that Sanguine submitted on the Standard Form. On August 11, 1981, the parties reached a settlement agreement. The parties stipulated both to the facts set forth in Sanguine's complaint and the invalidity of Speaks' ruling. The parties also submitted a consent decree, which the district court entered as its final order on that date. The order permanently enjoined the government from requiring Sanguine to use the Rev. April 1981 Form, delared that Speaks' ruling was unlawful, and ordered the government to approve communitization agreements that Sanguine submitted on the Standard Form pending the lawful adoption of a different form of communitization agreement.

On September 14, 1981, appellants filed a motion to intervene in the action between Sanguine and the government, which the district court denied. Fed. R. Civ. P. 24(a)(2) provides,

> "Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or imepde his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

The district court found that appellants' motion to intervene was timely. Nonetheless, it denied the motion to intervene as of right because it found that the government adequately represented appellants' interests. The Indian lessors

appealed and appellees Sanguine and the government both support the trial court's ruling.

I

Appellees contend that the district court erred in finding that appellants' motion for intervention was timely. The trial court must determine timeliness in light of all of the circumstances, *NAACP v. New York,* 413 U.S. 345, 366 (1973), including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances. *United Nuclear Corp. v. Cannon,* 696 F.2d 141, 143 (1st Cir. 1982); *Stallworth v. Monsanto Co.,* 558 F.2d 257, 264-66 (5th Cir. 1977). The trial court's determination is subject to review only for abuse of discretion. *NAACP v. New York,* 413 U.S. at 366; *Lumbermens Mutual Casualty Co. v. Rhodes,* 403 F.2d 2, 5 (10th Cir. 1968), *cert. denied,* 394 U.S. 965 (1969).

Appellants did not move to intervene in the instant case until more than thirty days after entry of judgment. Courts are normally reluctant to grant a motion to intervene at a late stage in the proceedings or after entry of judgment. *See, e.g., Alaniz v. Tillie Lewis Foods,* 572 F.2d 657, 659 (9th Cir.) (per curiam), *cert. denied,* 439 U.S. 837 (1978). Furthermore, in reliance on the consent decree, Sanguine entered into communitization agreements and began drilling on appellants' lands befoare appellants moved to intervene. Thus, Sanguine may suffer prejudice if we grant appellants' motion. On the

other hand, as we discuss below, appellants will suffer prejudice if we do not allow them to intervene. Moreover, appellants submitted an affidavit from Newton Lamar, President of the Wichita and Affiliated Tribes, Appellants' Reply Brief, Ex. A, indicating that appellants were not aware of their interest until approximately two weeks after entry of judgment. The affidavit also asserts that appellants did not learn of their interest until that late date because the BIA did not release the names of the affected lessors until August 20, 1981, over a month after Lamar had requested that information. Under these circumstances, we cannot conclude that the trial court abused its discretion in finding that appellants' motion to intervene was timely.

II

A

Although an applicant for intervention as of right bears the burden of showing inadequate representation, that burden is the "minimal" one of showing that representation "may" be inadequate. *Trbovich v. United Mine Workers,* 404 U.S. 528 n.10 (1972); *National Farm Lines v. ICC,* 564 F.2d 381, 383 (10th Cir. 1977). An applicant may fulfill this burden by showing collusion between the representative and an opposing party, that the representative has an interest adverse to the applicant, or that the representative failed in fulfilling his duty to represent the applicant's interest. *See generally* 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1909 at 523-32 (1972).

Appellants in the instant case primarily contend that the government did not adequately represent Appellants' interests because the government did not vigorously oppose Sanguine's claims. Of course, representation is not inadequate simply because the applicant and the representative disagree regarding the facts or law of the case. *United States v. Board of School Commissioners,* 466 F.2d 573, 575 (7th Cir. 1972), *cert. denied,* 410 U.S. 909 (1973). Nor is representation inadequate merely because the representative enters into a consent decree, because "any case, even the most vigorously defended, may culminate in a consent decree." *Commonwealth of Pennsylvania v. Rizzo,* 530 F.2d 501, 505 (3d Cir.), *cert. denied,* 426 U.S. 921 (1976). Here, however, the government in effect conceded the case at the outset. The government did not file a responsive pleading or brief; at the hearing it called no witnesses and made no significant arguments against Sanguine's motion. Instead, government counsel essentially agreed that Speaks' actions were unlawful. In the consent decree, which was entered only thirty-three days after Sanguine filed suit, the government stipulated to all of the facts and to the legal conclusions stated in Sanguine's motion for an injunction. We question neither the good faith nor the competency of the government or its counsel. However, under these circumstances we conclude that appellants have sustained their minimal burden of showing that the government's representation of appellants' interests may have been inadequate.

B

We next consider whether appellants possess "an interest relating to the property or transaction which is the subject of the action" within the meaning of Rule 24(a)(2). As we recently noted in *Rosebud Coal Sales Co. v. Andrus,* 644 F.2d 849, 850 (10th Cir. 1981) (per curiam), courts have enjoyed little success in attempting to define precisely the type of interest necessary for intervention. *See generally* 3B J. Moore & J. Kennedy, *Moore's Federal Practice* § 24.07[2] (2d ed. 1982). Thus, we determine whether an applicant's interest is sufficient by applying the policies underlying the "interest" requirement to the particular facts of the case. *Rosebud Coal Sales Co. v. Andrus,* 644 F.2d at 850; *see Nuesse v. Camp,* 385 F.2d 694, 700 (D.C. Cir. 1967) ("the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.").

In contending that appellants lack a sufficient interest in the suit between Sanguine and the government, appellees emphasize that the leases at issue do not grant appellants a voice in accepting or rejecting a communitization agreement. Thus, appellees argue, appellants' interest in the suit is too remote to justify intervention. We disagree. First, we note that the consent decree may have the effect of modifying the rights of some appellants in outstanding leases. *See* Appellants' Reply Brief, Ex. B. Also, Speaks' ruling, if applied, would provide a direct economic benefit to appellants, since they could re-lease the nonproducing zones on

their lands when the primary terms of their leases expire. Further, appellants' economic stake in the challenged ruling is not fortuitous; it exists precisely because the government has a duty to protect the economic interests of lessors of restricted Indian lands. *Compare Rosebud Coal,* 644 F.2d at 851, *with County of Fresno v. Andrus,* 622 F.2d 436, 438 (9th Cir. 1980). We have held that applicants in situations similar to appellants' possess a sufficient interest to intervene in suits challenging agency actions. *See Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission,* 578 F.2d 1341 (10th Cir. 1978); *National Farm Lines v. ICC,* 564 F.2d at 381.

C

Given appellants' interest in enforcing the challenged ruling, it is clear that they are so situated that the consent decree "may as a practical matter impair or impede" their ability to protect that interest. The consent decree enjoins the government from requiring Sanguine to use the Rev. April 1981 Form, and we perceive no means by which appellants could compel the government to violate the decree. Moreover, even if appellants may challenge the government's approval of Standard Form communitization agreements in a separate action, *cf. Kenai Oil & Gas, Inc. v. Department of Interior,* 671 F.2d 383 (10th Cir. 1982) (in action by lessee against Superintendent of the BIA court held that Superintendent's refusal to approve communitization agreement is reversible if arbitrary, capricious, an abuse of discretion,

or contrary to law), judicial review of agency action may as a practical matter afford the applicant much less protection than the opportunity to participate in proceedings to uphold agency actions in the first place. *Natural Resources Defense Council v. Costle,* 561 F.2d 904, 909 (D.C. Cir. 1977); *see Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission,* 578 F.2d a 1345; *see also Nuesse v. Camp,* 385 F.2d at 702 (opportunity to raise some issue in another forum is not bar to intervention as of right).

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We reverse the order of the district court denying appellants' motion under Fed. R. Civ. P. 24(a)(2) and remand the case with the direction that it permit appellants to intervene.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SANGUINE, LTD., Plaintiff,	)	Filed December 2, 1981
vs.	)	No. CIV-81-917-E
UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, UNITED STATES GEOLOGICAL SURVEY, STANLEY SPEAKS, and F. L. STELZER, Defendants.	)	

ORDER

On September 14, 1981, Delra M. Toohey, Mae Lamar Davis, Imogene Birch, Eva Lois Warden, Richard Guy, Wildena F. Guy Moffer, Willard B. Guy, Berdena Holder, and Ronnie F. Birch, Sr. (movants) filed a Motion to Intervene, pursuant to Rule 24 of the Federal Rules of Civil Procedure requesting to intervene as defendants. Both the defendant and the plaintiff have responded to this motion and it is now before the court for its determination. These parties seek to intervene under both Rule 24(a) and 24(b).

These parties seeking to intervene under Rule 24(a) do not show or contend that any statute of the United States

confers an unconditional right to intervene. This being so, in order to intervene under 24(a), they must, after having made timely application, claim an interest relating to the property or transaction which is the subject of the action, and they must be situated such that the disposition of the action may as a practical matter impair or impede their ability to protect their interest. If they have met these requirements they should be allowed to intervene unless their interest was adequately represented by the existing parties.

In determining whether timely application has been made, the fact that such application is made after a judgment has been made in the case is not dispositive. This question must be answered in each case by the exercise of the sound discretion of the trial court. *Lumbermen's Mutual Casualty Co. v. Rhodes,* 403 F.2d 2, 5 (10th Cir. 1968). However, there is considerable reluctance on the part of courts to allow intervention after the action has gone to judgment and a strong showing will be required of the applicant. *McClain v. Wagner Electric Corporation,* 550 F.2d 1115, 1120 (8th Cir. 1977). The court should look at the time elapsed since the inception of the suit and related circumstances, including the purpose for which intervention is sought, the necessity for intervention as a means of preserving the applicant's rights, and the improbability of prejudice to those already parties in the case. *Moten v. Bricklayers, Masons, and Plasterers Etc.,* 543 F.2d 224 (D.C. Cir. 1976). Upon reviewing these factors in the case at bar, this court believes that, although it is a close

decision, this motion should be considered timely.

The court need not decide every requirement because even assuming the "interest" and "impairment" requirements are met, this application is legally insufficient because it does not show that their interest[s] were inadequately represented by the existing parties. The Supreme Court in the case of *Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n. 10 (1972), has said that the requirement of Rule 24(a) is satisfied "if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." In line with the Supreme Court's ruling, the burden, although slight, continues to be on the movants to show that the representation was inadequate. *National Farm Lines v. I.C.C.,* 564 F.2d 381, 383 (10th Cir. 1977). In *United States v. Board of School Commissioners of Indianapolis,* 466 F.2d 573, 575 (7th Cir. 1972), the court established a standard for determining the adequacy of representation:

> [R]epresentation is adequate if no collusion is shown between the representative and an opposing party, if the representative does not have or represent an interest adverse to the proposed intervenor and if the representative does not fail in the fulfillment of his duty.

Here, the proposed intervenors have failed to show any of the above, nor have they shown they possess any experience or knowledge which the government does not have. The mere fact that this action did not proceed to trial does not establish inadequate representation. No allegation of bad faith has

been made, but only of bad judgment in that they believe the United States Attorney did not assert their interests as vigorously and effectively as they would have. The fact that they would have utilized different litigation tactics does not mean that the United States Attorney inadequately represented their interests in this litigation. The United States Attorney's entry into the consent decree does not amount to a failure to fulfill its duty to represent these movants. *United States v. American Institute of Real Estate Appraisers of National Association of Realtors,* 442 F.Supp. 1072, 1080 (N.D. Ill. 1977). Therefore, it is the conclusion of this court that the proposed intervenors have failed to establish the elements necessary to be entitled to intervention as of right.

In the alternative, the movants seek to intervene under Rule 24(b). Wright and Miller, Federal Practice and Procedure: Civil § 1913 provides:

> If there is no right to intervene under Rule 24(a) it is wholly discretionary with the court whether to allow intervention under Rule 24(b) and even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied, the court may refuse to allow intervention.

Upon reviewing the facts and circumstances of this case it is the conclusion of this court that intervention should not be allowed under Rule 24(b) either. Therefore,

IT IS ORDERED that the Motion to Intervene be and the same is hereby denied.

The Clerk of the Court is directed to mail a copy hereof to counsel of record.

DATED this 2nd day of December, 1981.

/s/ Luther B. Eubanks
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SANGUINE, LTD.,	)	Filed August 11, 1981
Plaintiff,	)	
	)	Case No. CIV-81-917-E
vs.	)	
	)	
UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, UNITED STATES GEOLOGICAL SURVEY, STANLEY SPEAKS, and F. L. STELZER,	)	
Defendants.	)	

ORDER

The parties having stipulated to the entry of this Order, and this Court having determined that the challenged action of defendants was without proper notice and an opportunity for public comment and would effect an improper retroactive modification of plaintiff's oil and gas leases on restricted Indian lands, and for other reasons stated in open Court at the hearing on plaintiff's application for a preliminary injunction on July 16, 1981, it is this 11th day of August, 1981, hereby

DECLARED that the requirement of defendants that communitization agreements for restricted Indian lands be submitted on the "Rev. April 1981 Form" is unlawful and

invalid, as applied to oil and gas leases approved by the Bureau of Indian Affairs prior to April 10, 1981, in which Sanguine, Ltd. owns or hereafter acquires a legal or beneficial interest, and it is therefore

ORDERED that defendants shall be, and hereby are, permanently enjoined from requiring use of the "Rev. April 1981 Form" communitization agreement for restricted Indian lands subject to the supervision and jurisdiction of the defendants, as applied to oil and gas leases approved by the Bureau of Indian Affairs prior to April 10, 1981, in which Sanguine, Ltd. owns or hereafter acquires a legal or beneficial interest, and it is further

ORDERED that, pending the lawful adoption of any different form communitization agreement, defendants shall execute and approve communitization agreements submitted on the form attached hereto as Exhibit A with respect to oil and gas leases approved by the Bureau of Indian Affairs prior to April 10, 1981, in which Sanguine, Ltd. owns or hereafter acquires a legal or beneficial interest.

/s/ Luther B. Eubanks
United States District Judge

Approved as to Form:

/s/ Kent L. Jones
Kent L. Jones
Attorney for plaintiff

/s/ Kathleen Flanagan
Kathleen Flanagan
Assistant
United States Attorney
Attorney for defendants

EXHIBIT A TO ORDER

COMMUNITIZATION AGREEMENT

This Agreement made and entered into this day of , 1981 between the undersigned owners of the oil, gas and minerals and mineral rights, or an interest therein, in, on, and under the lands particularly described on Exhibit "A" hereof, and who for convenience and identification are hereinafter referred to collectively as "Royalty Owners", and the undersigned, _____ and who are hereinafter referred to for convenience and identification as "Lessee".

WITNESSETH:

WHEREAS, Lessees are the owners and holders of oil and gas leases listed in Exhibit "B" attached hereto and made a part hereof, and covering lands in Caddo County, Oklahoma, to-wit:

WHEREAS, it is desire to communitize all of the above referred to oil and gas leases insofar as they pertain to and in order to form one (1) communitized area out of the lands described above which, for purposes of this Agreement, shall be deemed to contain

and .

WHEREAS, by Order No.
(Attached hereto as Exhibit "C"), the Corporation Commission of the State of Oklahoma established the above described land as one drilling and spacing unit for the production of gas and gas condensate from the

formations; and

WHEREAS, in order to be consistent with the existing rules and regulations covering well spacing and production allowables, it is desirable to operate the communitized area as an entirety for the purposes and intention of developing and producing gas and gas condensate from the above designated formations in accordance with the terms and provisions of this Agreement.

NOW THEREFORE, in consideration of the premises and mutual advantages offered by this Agreement, it is mutually convenanted and agreed by and between the parties hereto that the lands subject to this Agreement shall be developed as an entirety by the Lessees or their successors or assigns for gas and gas condensate producible from the formations hereinafter referred to as "communitized substances", with the understanding and agreement that the communitized substances produced from the communitized area shall be allocated among the leaseholds comprising said area in the proportion that the acreage interest of each leasehold or committed portion bears to the entire acreage interest committed thereto. The royalties payable for communitized substances so allocated to the lands comprising the leaseholds and the rentals provided for in the individual leases shall be determined and paid on the basis respectively prescribed in such leases. There shall be no obligation on Lessees or their successors or assigns to offset any well or wells on separate component tracts into which said communitized land is now or may hereinafter be divided, nor shall Lessees or their successors or assigns

be required to measure separately communitized substances by reason of the diverse ownership of the minerals in and under the communitized area from drainage by a well or wells which may be drilled offsetting said area. Payments of rentals under the terms of the leases hereinabove mentioned shall not be affected by this Agreement, except as may herein be otherwise provided.

Except as herein modified and changed, the said oil and gas leases described on Exhibit "B" shall remain in full force and effect as originally drawn.

It is further agreed that the commencement, completion, continued operation or production of a well or wells for communitized substances on the communitized area shall be construed and considered as the commencement, completion, continued operation or production from each and all of the lands within and comprising said communitized area.

It is further agreed that all production of communitized substances and disposal thereof shall be in conformity with allocations, allotments and quotes made or fixed by any duly authorized person or regulatory body under applicable Federal or State statute. The provisions of this Agreement shall be subject to all applicable Federal and State laws or executive orders, rules and regulations which affect performance of any of the provisions of this Agreement and no party hereto shall suffer a forfeiture or be liable in damages for failure to comply with any of the provisions of this Agreement if

such compliance is prevented by, or if such failure results from, compliance with any such law, order, rule or regulations or his duly authorized representative, be effective as of 1981, and shall remain in full force and effect as to the formations individually during the primary term of the restricted Indian Leases or for a term of one year from said effective date; whichever is the lesser and so long thereafter as any communitized substance is produced from any part of said communitized area in paying quantities. The one (1) year term of this Agreement will not, in itself, serve to extend the term of any Indian Lease which would otherwise expire during said period.

This Agreement may be executed in one or more counterparts by any of the parties hereto and all counterparts so executed shall be taken as a single agreement and shall have the same force and effect as if all parties had in fact executed but a single instrument.

It is further agreed between the parties hereto that the Secretary of the Interior or his representative shall have the right of supervision over all operations within the communitized area to the same extent and degree as provided in said departmental oil and gas leases and in the oil and gas regulations of the Department of the Interior. Any damage to Indian land committed to this Agreement shall be governed by Departmental Oil and Gas Regulations.

is unleased at this time and that all adult restricted mineral owners that own under

this tract have signed the Communitization Agreement. In the event of production, all monies due this unleased proportionate part of the unit will be held in suspense until there is a lease issued. At that time, the Lessor of said tract will pay for its proportionate part of all drilling costs.

This Agreement shall be binding upon the parties hereto and shall extend to and be binding upon their heirs, executors, administrators, successors and assigns.

The name and address of the designated Operator of this Communitized are

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SANGUINE, LTD.,	)	Filed July 20, 1981
Plaintiff,	)	
	)	Case No. CIV-81-917-E
vs.	)	
	)	
UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, UNITED STATES GEOLOGICAL SURVEY, STANLEY SPEAKS, and F. L. STELZER,	)	
Defendants.	)	

ORDER

Upon plaintiff's application for a preliminary injunction, having heard the evidence and argument of counsel, and having determined that the challenged action of defendants was without proper notice and an opportunity for public comment and effects an improper retroactive modification of plaintiff's oil and gas leases on restricted Indian lands, and for other reasons stated in open Court on July 16, 1981, it is this 20th day of July, 1981, hereby

ORDERED that defendants shall be, and hereby are, enjoined, pending further order of this Court, from requiring use of the "Rev. April 1981 Form" communitization agreement for leases subject to the supervision and jurisdic-

tion of the Bureau of Indian Affairs in which plaintiff Sanguine, Ltd., owns a legal or beneficial interest, and it is further

ORDERED that defendants shall, by August 1, 1981, execute and approve communitization agreements submitted by plaintiff Sanguine, Ltd. on or before July 22, 1981, on the form attached hereto as Exhibit A with respect to the units listed on Exhibit B, attached hereto, and it is further

ORDERED that, if plaintiff Sanguine, Ltd., submits communitization agreements on the form attached hereto as Exhibit A with respect to any of the units listed on Exhibit B after July 22, 1981, defendants shall promptly execute and approve such agreements.

The defendants have stipulated that no bond need be required and no bond is ordered.

/s/ Luther B. Eubanks
United States District Judge

Approved as to Form:

/s/ Kent L. Jones
Kent L. Jones
Attorney for plaintiff

/s/ Kathleen Flanagan
Kathleen Flanagan
Assistant United States Attorney
Attorney for defendants

EXHIBIT A TO ORDER

COMMUNITIZATION AGREEMENT

This Agreement made and entered into this day of , 1981 between the undersigned owners of the oil, gas and minerals and mineral rights, or an interest therein, in, on, and under the lands particularly described on Exhibit "A" hereof, and who for convenience and identification are hereinafter referred to collectively as "Royalty Owners"" and the undersigned, _____ and who are hereinafter referred to for convenience and identification as "Lessee".

WITNESSETH:

WHEREAS, Lessees are the owners and holders of oil and gas leases listed in Exhibit "B" attached hereto and made a part hereof, and covering lands in Caddo County, Oklahoma, to-wit:

WHEREAS, it is desire to communitize all of the above referred to oil and gas leases insofar as they pertain to and in order to form one (1) communitized area out of the lands described above which, for purposes of this Agreement, shall be deemed to contain

and

WHEREAS, by Order No.
(Attached hereto as Exhibit "C"), the Corporation Commission of the State of Oklahoma established the above described land as one drilling and spacing unit for the production of gas and gas condensate from the

formations; and

WHEREAS, in order to be consistent with the existing rules and regulations covering well spacing and production allowables, it is desirable to operate the communitized area as an entirety for the purposes and intention of developing and producing gas and gas condensate from the above designated formations in accordance with the terms and provisions of this Agreement.

NOW THEREFORE, in consideration of the premises and mutual advantages offered by this Agreement, it is mutually covenanted and agreed by and between the parties hereto that the lands subject to this Agreement shall be developed as an entirety by the Lessees or their successors or assigns for gas and gas condensate producible from the formations hereinafter referred to as "communitized substances", with the understanding and agreement that the communitized substances produced from the communitized area shall be allocated among the leaseholds comprising said area in the proportion that the acreage interest of each leasehold or committed portion bears to the entire acreage interest committed thereto. The royalties payable for communitized substances so allocated to the lands comprising the leaseholds and the rentals provided for in the individual leases shall be determined and paid on the basis respectively prescribed in such leases. There shall be no obligation on Lessees or their successors or assigns to offset any well or wells on separate component tracts into which said communitized land is now or may hereinafter be

divided, nor shall Lessees or their successors or assigns be required to measure separately communitized substances by reason of the diverse ownership of the minerals in and under the communitized area from drainage by a well or wells which may be drilled offsetting said area. Payments of rentals under the terms of the leases hereinabove mentioned shall not be affected by this Agreement, except as may herein be otherwise provided.

Except as herein modified and changed, the said oil and gas leases described on Exhibit "B" shall remain in full force and effect as originally drawn.

It is further agreed that the commencement, completion, continued operation or production of a well or wells for communitized substances on the communitized area shall be construed and considered as the commencement, completion, continued operation or production from each and all of the lands within and comprising said communitized area.

It is further agreed that all production of communitized substances and disposal therof shall be in conformity with allocations, allotments and quotes made or fixed by any duly authorized person or regulatory body under applicable Federal or State statute. The provisions of this Agreement shall be subject to all applicable Federal and State laws or executive orders, rules and regulations which affect performance of any of the provisions of this Agreement and no party hereto shall suffer a forfeiture or be liable in damages for failure

to comply with any of the provisions of this Agreement if such compliance is prevented by, or if such failure results from, compliance with any such law, order, rule or regulations or his duly authorized representative, be effective as of 1981, and shall remain in full force and effect as to the formations individually during the primary term of the restricted Indian Leases or for a term of one year from said effective data; whichever is the lesser and so long thereafter as any communitized substance is produced from any part of said communitized area in paying quantities. The one (1) year term of this Agreement will not, in itself, serve to extend the term of any Indian Lease which would otherwise expire during said period.

This Agreement may be executed in one or more counterparts by any of the parties hereto and all counterparts so executed shall be taken as a single agreement and shall have the same force and effect as if all parties had in fact executed but a single instrument.

It is further agreed between the parties hereto that the Secretary of the Interior or his representatives shall have the right of supervision over all operations within the communitized area to the same extent and degree as provided in said departmental oil and gas leases and in the oil and gas regulations of the Department of the Interior. Any damage to Indian land committed to this Agreement shall be governed by Departmental Oil and Gas Regulations.

is unleased at this time

and that all adult restricted mineral owners that own under this tract have signed the Communitization Agreement. In the event of production, all monies due this unleased proportionate part of the unit will be held in suspense until there is a lease issued. At that time, the Lessor of said tract will pay for its proportionate part of all drilling costs.

This Agreement shall be binding upon the parties hereto and shall extend to and be binding upon their heirs, executors, administrators, successors and assigns.

The name and address of the designated Operator of this Communitized are

EXHIBIT B TO ORDER

"Subject Leases" Referred To In
Paragraphs 2, 24 and 29 of Complaint
In *Sanguine, Ltd. v. U.S. Department*
Of The Interior, Et Al., Civ. No. 81-917-E

Lease Locations	Lease Acreage	Expiration Date
Section 14-7N-9W	160	August 1981
Section 2-7N-10W	408	September 1981
Section 8-8N-10W	280	August 1981
Section 18-8N-10W	40	September 1981
Section 19-8N-10W	312	August 1981
Section 28-8N-10W	210	August 1981
Section 33-8N-10W	118	August 1981
Section 34-8N-10W	160	August 1981
Section 36-8N-10W	205	August 1981
Section 32-9N-10W	160	August 1981
Section 2-9N-11W	160	August 1981
Section 25-9N-11W	60	September 1981
Section 15-7N-9W	116	April 1982

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SANGUINE, LTD.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,	)	
	)	
Defendants.	)	Case No. CIV-81-917-E

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LUTHER B. EUBANKS
IN OKLAHOMA CITY, OKLAHOMA
ON JULY 16, 1981

APPEARANCES:

MR. KENT L. JONES, MR. JAMES T. HARWICK and MR. MARK BLONGEWICZ, appearing on behalf of the Plaintiff.

MS. KATHLEEN FLANAGAN, Assistant United States District Attorney, appearing on behalf of the Defendants.

* * *

I am going to grant preliminary injunction in this case, if for no other reason at all than the one undisputed piece

of evidence that the assistant Secretary of the Interior or the Bureau of Indian man hadn't even approved what the local man down here, the area man, Mr. Speaks, is doing according to this evidence. And by Mrs. Flanagan's statement that these new regulations and requirements have not been published in the registry, why, that looks to me like taking property without due process of law, at the rawest, without deciding it of course.

So I am going to grant preliminary injunction in this case and then we'll get all the facts and try to decide the case on the merits at an early date.[1]

[1]Pages 58 lines 2 to 15.

APPENDIX J

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The Due Process Clause of the Constitution, U.S. Const. amend. V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Act of March 3, 1909, 25 U.S.C. § 396:

> All lands allotted to Indians in severalty, except allotments made to members of the Five Civilized Tribes and Osage Indians in Oklahoma, may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior; and the Secretary of the Interior is authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this section into full force and effect: *Provided,* That if the said allottee is deceased and the heirs to or devisees of any interest in the allotment have not been determined, or, if determined, some or all of them cannot be located, the Secretary of the Interior may offer for sale leases for mining purposes to the highest responsible qualified bidder, at public auction, or on sealed bids, after notice and advertisement, upon such terms and conditions as the Secretary of the Interior may prescribe. The Secretary of the Interior shall have the right to reject all bids whenever in his judgment the interests of the Indians will be served by so doing, and to readvertise such lease for sale.

Act of May 11, 1983, § 4, 25 U.S.C. § 396d:

> All operations under any oil, gas, or other mineral

lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior.

In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

Code of Federal Regulations, 25 C.F.R. § 212.24 (redesignated from 25 C.F.R. § 172.24 at 47 Fed. Reg. 13327):

(a) Lessees will be required to carry out and observe the operating regulations now or hereafter in force governing oil and gas operations on restricted Indian lands. Operations will not be permitted under any lease requiring approval of the Secretary of the Interior until the approved lease has been delivered.

(b) All leases issued under the provisions of the regulations in this part shall be subject to imposition by the Secretary of such restrictions as to time or times for the drilling of wells and as to the production from any well or wells as in his judgment may be necessary or proper for the protection of the natural resources of the leased land and in the interests of the Indian lessor. In the exercise of his judgment the Secretary may take into consideration among other things the Federal laws, State laws or regulations by competent Federal or State authorities or lawful agreements among operators regulating either drilling or production or both, and also any regulatory action desired by tribal authorities.

(c) All leases issued pursuant to the regulations in this part shall be subject to a co-operative or unit development plan affecting the leased lands if and when required by the Secretary of the Interior.

Code of Federal Regulations, 43 C.F.R. Part 14, as modified at 45 Fed. Reg. 85376, effective January 1, 1981, repealed September 30, 1981, at 46 Fed. Reg. 47783. 43 C.F.R. § 14.2(e):

(e) *Rule.* "Rule" means a statement of general or particular applicability and future effect which implements, interprets or prescribes law or policy or describes the organization, procedure or practice requirements of the Department. (5 U.S.C. 551(4))

43 C.F.R. § 14.3(a):

(a) *Significance.* (1) Before developing a new rule or amending an existing rule, the lead official must determine whether the rule or amendment will be a significant rule. (*See* § 14.4 *Determination of significance and need for regulatory analysis for criteria*) This determination must be in writing, state whether or not the rule is significant, and briefly describe the basis of the determination.

(2) If a rule is determined to be significant, the bureau developing or amending the rule will follow the procedures described in § 14.6 (*Development of significant rules*). If a rule is determined not to be significant, the bureau will follow the procedures described in § 14.7 (*Development of other rules*).

43 C.F.R. § 14.6(g)(1):

(g) *Publication of proposed significant rules.* (1) The public will be given a minimum of 60 calendar days

after the date of publication in the *Federal Register* to comment on proposed significant rules. A shorter period may be used only in special cases requiring more timely action. In such cases, the notice of proposed rulemaking will contain a statement of the reason for the shorter period.

Supreme Court, U.S.
FILED
NOV 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-634

In The
Supreme Court of the United States
October Term, 1986

SANGUINE, Ltd.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,
DELRA M. TOOHEY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS DELRA M. TOOHEY, ET AL. TO PETITION FOR WRIT OF CERTIORARI

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

10 pp

QUESTION PRESENTED

1. Do this Court's holdings in *Nevada v. United States,* 463 U.S. 110 (1983), and *Arizona v. California,* 460 U.S. 605 (1983) preclude Indian allottees from being heard in defense of their property rights when the allottees timely intervene in three month old litigation in which they are not otherwise adequately represented?

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Sanguine, Ltd. v. United States Dept. of the Interior, 798 F.2d 389 (10th Cir. 1986) ..... *passim*

FEDERAL REGULATION

25 C.F.R. § 212.24(b)(c) 2

No. 86-634

In The
Supreme Court of the United States
October Term, 1986

SANGUINE, Ltd.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,
DELRA M. TOOHEY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS DELRA M. TOOHEY, ET AL. TO PETITION FOR WRIT OF CERTIORARI

Respondents, Delra M. Toohey, *et al.* ("Allottees"), respectfully urge this Court to deny the Petition for a Writ of Certiorari by which Sanguine, Ltd. ("Sanguine") seeks review of the United States Court of Appeals for the Tenth Circuit's decision in this case, *Sanguine, Ltd. v. United States Dept. of the Interior*, 798 F.2d 389 (10th Cir. 1986).

STATEMENT OF THE CASE

This case has been the subject of two unanimous decisions by different panels of the Tenth Circuit Court of

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Appeals. *Sanguine, Ltd. v. United States Dept. of the Interior,* 736 F.2d 1416 (10th Cir. 1984) (*"Sanguine I"*) and *Sanguine, Ltd. v. United States Dept. of the Interior,* 798 F.2d 389 (10th Cir. 1986) (*"Sanguine II"*).

The facts of the case are both "unique" in modern times and, for the affected Allottees, most unfortunate. The Anadarko Area Office of the Bureau of Indian Affairs ("Anadarko") has jurisdiction over oil and gas operations on Indian trust lands in Western Oklahoma. In 1978, a provision was added to the standard Indian oil and gas lease, which required the release of all non-producing zones at the expiration of the primary term of the lease. Three years later, in 1981, leases issued in 1978 began to expire. Anadarko decided that operators seeking to extend non-productive Indian oil and gas leases through communitization,[1] and without the consent of the Indian lessors, should conform to current leasing policy which required release of non-productive zones at the end of the primary term of the lease. The decision to approve a communitization agreement is entirely discretionary. 25 C.F.R. § 212.24 (b) (c); *Kenai Oil & Gas, Inc. v. Dept. of the Interior,* 671 F.2d 383 (10th Cir. 1982).

In July 1981, Sanguine, an oil and gas operator, sued both to challenge the requirement of release of non-productive zones as a condition of communitization and to compel the Anadarko Area Director to approve specific communitization agreements already submitted on thirteen units. The

---

[1] Communitization is essentially a conservation measure whereby several leases are pooled into a single unit for purposes of development and production. This conserves natural resources by eliminating over-drilling and reduces the cost of development since leases are extended by drilling one well per communitized unit, instead of one well per lease.

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Indians whose leases were in the thirteen units directly affected by Sanguine's suit were not notified of the litigation.

Although by Sanguine's own calculations nearly forty-five million dollars in Indian oil and gas rights were at stake in the leases then before the district court, the government took no action to defend the Allottees' interests. As found by the court in *Sanguine I:*

> Here, however, the government in effect conceded the case at the outset. The government did not file a responsive pleading or brief; at the hearing, it called no witnesses and made no significant arguments against Sanguine's motion. Instead, government counsel essentially agreed that Speaks' [the Area Director's] actions were unlawful. [*Sanguine I,* 736 F.2d at 1419.]

Shortly after the hearing on Sanguine's motion for preliminary injunction, which the district court granted, the government agreed to settle the case, again without notice to the affected Allottees:

> In the consent decree, which was entered only thirty-three days after Sanguine filed suit, the government stipulated to all of the facts and to the legal conclusions stated in Sanguine's motion for injunction. [*Sanguine I,* 736 F.2d at 1419.]

Several Allottees attempted to intervene before the district court thirty days after the consent decree was entered. The district court found the Allottees' motion to intervene to be timely, but denied intervention on the basis that the Allottees' rights had been represented adequately by the United States. On appeal, the Tenth Circuit reversed and remanded, with directions to the district court to allow the Allottees to intervene:

> Given appellants' [the Allottees'] interest in enforcing the challenged ruling, it is clear that they are so sit-

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> uated that the consent decree "may as a practical matter impair or impede" their ability to protect that interest. The consent decree enjoins the government from requiring Sanguine to use the Rev. April 1981 Form, and we perceive no means by which appellants could compel the government to violate the decree. Moreover, even if appellants may challenge the government's approval of Standard Form communitization agreements in a separate action, . . . judicial review of agency action may as a practical matter afford the applicant much less protection than the opportunity to participate in proceedings to uphold agency actions in the first place. [*Sanguine I*, 736 F2d at 1420.]

On remand, the district court read the Tenth Circuit's mandate as requiring a hearing on the merits of the case. Thus, the lower court vacated the consent decree, which had disposed of the entire litigation.

Sanguine again appealed to the Tenth Circuit. A different panel unanimously upheld the district court, concluding that:

> Since the government did not contest Sanguine's challenge of the rule and the issues essential to the intervenors [the Allottees] were resolved by consent decree and not adversary litigation, *this case presents a unique situation* in which prejudice to the intervenors can be avoided only by setting aside the prior judgment and allowing the opportunity to litigate the merits of the case. [*Sanguine II*, 798 F.2d at 391 (emphasis added).]

———o———

REASON FOR DENYING THE PETITION

The Decision Below Is Based Upon And Is Consistent With The Holdings Of This Court.

In the "unique" circumstances of this case, the Tenth Circuit's holding was correct and indeed mandated by the principles of due process formulated by this Court.[2] The appeals court's holding does no violence to the decisions of this Court in *Arizona v. California*, 460 U.S. 605 (1983) or *Nevada v. United States*, 463 U.S. 110 (1983).

In finding that the intervenors must be allowed a hearing in this case, the Tenth Circuit discussed *Arizona* and *Nevada* at length and found that these cases "are readily distinguished by the adequacy of the representation afforded the intervenors."[3] *Arizona* and *Nevada* are also distinguished by the timeliness of the Indians' intervention. In those cases, the Indians sought to intervene nearly thirty years after full and open adjudications. By contrast, here the Allottees sought to participate thirty days after a hasty and secretive settlement was reached.

Clearly the Tenth Circuit's decision in this case correctly applied the law. In the context of these unique facts, the appeals court reached the only result possible con-

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[2] *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n.7 (1979); *Hansberry v. Lee*, 311 U.S. 32 (1940), both holding that *due* process would be denied if a party, not adequately represented in litigation, were to be bound by the results.

[3] *Sanguine II*, 798 F.2d at 391. This distinction also applies to the holding in *Heckman v. United States*, 224 U.S. 413 (1912), a case in which the United States sued successfully to protect the Indians against illegal alienation of their trust land.

sistent with basic notions of due process. The case does not meet the criteria for review by this Court.

CONCLUSION

For the foregoing reason, Respondents, Delra M. Toohey *et al.*, urge that the Petition for Writ of Certiorari be denied.

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(3)

Supreme Court, U.S.
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No. 86-634

In the Supreme Court of the United States

OCTOBER TERM, 1986

SANGUINE, LTD., PETITIONER

v.

UNITED STATES DEPARTMENT OF INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

On a prior appeal in this suit against the Department of the Interior and officials of that Department to challenge a policy affecting petitioner's oil and gas leases of Indian lands, the court of appeals held that nine Indian allottees were entitled to intervene as of right, even though judgment had been entered, because their interests were not adequately represented by the federal defendants. The question presented in the instant petition is:

Whether, after the allottees were permitted to intervene, the district court erred in vacating the judgment that had been entered in the allottees' absence, thereby enabling them to have a meaningful opportunity to litigate various substantive issues in the course of further proceedings in district court or before the Secretary.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 798 F.2d 389. The order of the district court (Pet. App. 8a-10a) is not reported. The opinion of the court of appeals on the prior appeal (Pet. App. 17a-27a) is reported at 736 F.2d 1416.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1986, and the petition for a writ of certiorari was filed on October 16, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, an oil and gas exploration company, entered into leases of restricted Indian allotments in western Oklahoma prior to 1981. Each lease granted petitioner the right to drill and extract oil and gas for a specified term of years and as long thereafter as oil and gas

were produced in paying quantities. Pet. App. 19a. The leases were issued pursuant to the Act of March 3, 1909, 25 U.S.C. 396, which authorizes the allottee to enter into such a lease, subject to approval by the Secretary, and authorizes the Secretary to make such rules and regulations as may be necessary to implement the leasing.

Under Section 4 of the Act of May 11, 1938, 25 U.S.C. 396d, oil and gas leases of allotted or unallotted Indian lands

> shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by [the] Secretary prior to or subsequent to the issuance of any such lease * * *.

See also 25 C.F.R. 172.24(c) (1981), recodified at 25 C.F.R. 212.24(c). The most common type of unit-development plan in western Oklahoma is implemented by a communitization agreement. Under such an agreement, all land included within one drilling and spacing unit, as established by the Oklahoma Corporation Commission, is developed as though the land were all under one lease, even though the land in fact may be leased by many different lessees and owned by many different lessors. As a result of communitization, operations conducted anywhere within the unit are deemed to occur on each leased parcel, and production anywhere within the unit will extend the duration of any lease within the unit beyond its primary term. Pet. App. 19a.

On April 10, 1981, the Director of the Anadarko Area Office of the Bureau of Indian Affairs (BIA) announced that communitization agreements submitted for his approval after April 1, 1981 would not be approved unless they included the following provision (Pet. App. 20a):

> All Trust or Restricted Leases committed by this agreement are hereby amended to provide that any

> non-producing zones shall be released at the end of the primary term of said lease.

Under this clause, a lessee who had drilled a well and begun producing oil or gas from one geologic formation or zone within the unit would not be entitled after the end of the primary lease term to produce from any other formations or zones within the unit in which production had not commenced.

2. On July 9, 1981, petitioner brought this action in the United States District Court for the Western District of Oklahoma against the Department of the Interior and various officials of that Department, challenging the Area Director's requirement that the above-quoted provision be included in communitization agreements. On the same day that the complaint was filed, petitioner moved for a preliminary injunction to prevent the application of that requirement to communitization agreements that petitioner proposed to submit for certain leases that were due to expire in August 1981. Following a hearing, the district court entered an order declaring the Area Director's action invalid because: (i) it constituted a "rule" for purposes of the Administrative Procedure Act, 5 U.S.C. 551(4), and accordingly should have been published in the Federal Register for public notice and comment; (ii) the Area Director lacked the authority to promulgate the rule; and (iii) the requirement retroactively modified petitioner's rights under existing leases. The district court also enjoined the defendants from requiring petitioner to use the new lease form and ordered the defendants to approve communitization agreements that petitioner submitted on the prior forms. Pet. App. 20a-21a, 40a-49a.

On August 11, 1981, petitioner and the federal defendants entered into a stipulation that the Area Director's requirement that the communitization agreements release nonproducing zones at the end of the primary term of the lease was invalid as applied to oil and gas leases "in which

[petitioner] owns or hereafter acquires a legal or beneficial interest" and that were approved by the Area Director prior to April 10, 1981. The defendants also consented to the entry of a permanent injunction, which was entered by the district court as a final order on August 11, 1981. Pet. App. 21a, 33a-39a.

3.a. On September 14, 1981, nine members of the Wichita and Affiliated Tribes of Oklahoma (hereinafter the "allottees") who own an interest in restricted lands leased by petitioner filed a motion to intervene in this case as defendants. The allottees contended that they were entitled to intervene as of right under Fed. R. Civ. P. 24(a) because their interests were not adequately represented by the government and that they should in any event be granted leave for permissive intervention under Fed. R. Civ. P. 24(b). Both petitioner and the federal defendants opposed the allottees' motion to intervene. By order dated December 2, 1981, the district court denied that motion (Pet. App. 28a-32a). The district court held that the allottees' motion was timely, but it found that the allottees had failed to demonstrate that their interests were inadequately represented by the federal defendants (*id.* at 31a).

b. On June 15, 1984, the court of appeals reversed the district court's order denying intervention, holding that the allottees were entitled to intervene as of right under Rule 24(a) (Pet. App. 17a-27a). The court of appeals first concluded that the district court did not abuse its discretion in finding the allottees' intervention motion to have been timely. The court reasoned that although petitioner might suffer prejudice as a result of the intervention, since it had entered into communitization agreements and begun drilling on the allottees' land prior to intervention, the allottees would suffer prejudice if they were *not* permitted to intervene. The court also noted that the allottees did not know of their interest in the suit until two weeks after judgment was entered, because the BIA did not

release the names of the affected landowners to the tribal president until August 20, 1981, more than a month after he requested that information. *Id.* at 22a-23a.

The court of appeals next concluded that the allottees had sustained their burden of showing that the government's representation of their interests may have been inadequate. The court stressed that represention is not inadequate for purposes of Rule 24(a) simply because the applicant for intervention and the representative disagree about the facts or law of the case or because the representative enters into a consent decree. But here, the court observed, "the government in effect conceded the case at the outset" (Pet. App. at 24a):

> The government did not file a responsive pleading or brief; at the hearing it called no witnesses and made no significant arguments against [petitioner's] motion [; and] * * * [i]n the consent decree, which was entered only thirty-three days after [petitioner] filed suit, the government stipulated to all of the facts and to the legal conclusions stated in [petitioner's] motion for an injunction. [1]

The court of appeals therefore remanded with instructions to permit the allottees to intervene (*id.* at 27a).

4.a. In accordance with the court of appeals' instructions, the district court, on remand, granted the allottees' motion to intervene (Pet. App. 16a). The allottees then filed an answer and sought relief in their own right: dismissal of petitioner's complaint; a declaratory judg-

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[1] The court of appeals also determined that the allottees satisfied the other requirements for intervention as of right, because they demonstrated that they have an interest in the subject matter of the action (the lands under lease) and that the decree entered in their absence impeded their ability to protect that interest (Pet. App. 25a-26a).

ment that the Area Director's April 10, 1981 requirement for communitization agreements was "legal and proper"; a declaration that the communitization agreements approved by the Area Director pursuant to the district court's order were null and void; and damages in an unspecified amount for losses caused by an alleged breach of contract by petitioner and an alleged breach of trust by the Secretary. The allottees also filed a motion to vacate the preliminary injunction entered on July 20, 1981 and the permanent injunction entered on August 11, 1981. After a hearing, the district court granted the allottees' motion to vacate the injunctions. The court then deferred action on all other pending motions and grounds for relief, including a possible remand of the matter to the Secretary, until petitioner was afforded an opportunity to appeal the order vacating the injunctions (*id.* at 8a-15a).

b. On interlocutory appeal pursuant to 28 U.S.C. 1292(a)(1) and (b), the court of appeals affirmed the district court's order vacating the injunctions (Pet. App. 1a-7a). The court of appeals explained that its holding on the first appeal that the allottees were entitled to intervene as of right was intended to assure the allottees a full hearing on issues affecting their property rights (*id.* at 7a). Unless the prior orders were vacated, the court reasoned, the allottees would not be able to litigate those issues (*id.* at 5a). The court of appeals also distinguished this Court's decisions in *Arizona* v. *California,* 460 U.S. 605 (1983), and *Nevada* v. *United States,* 463 U.S. 110 (1983), observing that, in both of those cases, the Indians' interest had been adequately represented by the government and the Indians were bound by prior judgments entered many years earlier (Pet. App. 6a). By contrast, in the "unique situation" presented here, the government had not actually "litigated" petitioner's challenge to the Area Director's requirement affecting communitization agreements; as a

result, the court concluded, the allottees' interests had not been adequately represented by the government, and they accordingly should not be bound by the judgment entered by the district court in 1981. *Id.* at 6a-7a.

ARGUMENT

The decision of the court of appeals, in what it characterized as the "unique situation" of this case (Pet. App. 7a), is correct and does not conflict with any decision of this Court or another court of appeals. Moreover, the case is currently in an interlocutory posture, because the district court, affirmed by the court of appeals, merely vacated its prior judgment in favor of petitioner in order to permit further proceedings on the merits; the court did not enter judgment in favor of the allottees. Petitoner of course might prevail in the further proceedings contemplated by the district court. But if it does not, and if the court of appeals should affirm a ruling against petitioner, there will be time enough for this Court to grant review—not only of the issue petitioner now seeks to raise, but of any other issues then presented. The petition for a writ of certiorari at this interlocutory stage of the case therefore should be denied.

1. On the previous appeal, the court of appeals held that the allottees' motion to intervene was timely, even though a final judgment had been entered in the case, and that the allottees were entitled to intervene as of right under Rule 24(a) because their interests may not have been adequately represented by the government. Petitioner does not challenge those rulings here. Petitioner challenges only the subsequent order of the district court, affirmed by the court of appeals, that granted the allottees' motion to vacate the injunctions that had been entered before the allottees were granted leave to intervene. But as the court

of appeals observed, the district court's order was essentially compelled by the court of appeals' prior ruling, which petitioner does not contest (Pet. App. 5a):

> if the district court did not vacate its prior orders, of what value is the right of intervention we held exists in this case? Left unaffected, the prior orders resolved the validity and enforceability of the [Area Director's] rule. Yet, these precise issues, we stated [on the prior appeal], were of sufficient interest to warrant intervention.

As the court of appeals further observed, "the government did not contest [petitioner's] challenge of the rule[,] and the issues essential to the intervenors were resolved by consent decree and not adversary litigation" (*id.* at 7a). We note as well that the land in issue is owned by the allottees, subject only to restrictions on alienation, and that the allottees themselves are granted the right to lease the lands under 25 U.S.C. 396. They therefore have a critical interest in vindicating their property rights. In these special circumstances, the courts below correctly concluded that the prior injunctive orders affecting the leases of the allottees' land should be vacated in order to permit the allottees' intervention to be meaningful.

Petitioners nevertheless contend (Pet. 14-16) that the decision by the courts below is inconsistent with the general rule that an intervenor ordinarily cannot challenge any order or decree entered prior to intervention. This general rule gives expression to important principles of finality and judicial economy, but it is not absolute. See *Bryant* v. *Yellen*, 447 U.S. 352, 366-368 (1980).[2] Accord-

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[2] In *Bryant* v. *Yellen*, the respondents before this Court also had been granted leave by the court of appeals to intervene after judgment had been entered by the district court, albeit for purposes of taking an appeal from an adverse judgment that the United States had declined to appeal. See 447 U.S. at 366-368. Thus, the intervenors in *Bryant* v. *Yellen* likewise were not bound by the final judgment, since they

ingly, an intervenor may challenge a prior order or decree if it "would deprive the intervenor of substantial rights which he had not been remiss in pressing." 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 24.16[5], at p. 24-180 (2d ed. 1985) (footnote omitted). That standard is satisfied here. The court of appeals specifically held on the prior appeal that the allottees' post-judgment motion was timely because they did not previously know of their interests in the case—which refutes any notion that the allottees were remiss in presenting their claims—and that the allottees' interests would not be protected in the absence of intervention.

The decisions upon which petitioner relies stand for the proposition that an intervenor has no absolute *right* to challenge orders and adjudications rendered prior to intervention[3]; they do not hold that a district court in the intervention context is deprived of its *power* under Fed. R.

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were not barred from challenging it on appeal. There is no reason why there should be a different result—*i.e.*, a rule making a prior order absolutely binding on an intervenor—where, as here, the intervenor challenges the order in district court. The allottees in this case, like the intervenors in *Bryant* v. *Yellen*, moved to intervene prior to the expiration of the 60-day period for taking an appeal under Fed. R. App. P. 4(a).

[3] See, *e.g.*, *United States* v. *California Canneries*, 279 U.S. 553, 556 (1929); *Galbreath* v. *Metropolitan Trust Co.*, 134 F.2d 569, 570 (10th Cir. 1943); *Yankton Sioux Tribe* v. *Nelson*, 604 F. Supp. 1146, 1155 (D.S.D. 1985); *Moore* v. *Tangipahoa Parish School Board*, 298 F. Supp. 288, 293 (E.D. La. 1969); *Stell* v. *Savannah-Chatham County Board of Education*, 255 F. Supp. 88, 92 (S.D. Ga. 1966); *United States* v. *The Audrey II*, 185 F. Supp. 777, 782 (N.D. Cal. 1960); *Hartly Pen Co.* v. *Lindy Pen Co.*, 16 F.R.D. 141 (S.D. Cal. 1954). The Court observed in *California Canneries* (279 U.S. at 556-557 n.1) that this principle was embodied in former Equity Rule 37, which provided that proceedings concerning the intervenors' interests were "subordinate" to the main proceeding. However, that provision was deliberately omitted from Fed. R. Civ. P. 24. See 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1920, at 611 (1972). Although the lower court decisions cited by petitioner that were

Civ. P. 60(b) to vacate a prior judgment in appropriate circumstances. While the court's power in this regard is by no means unlimited, it has discretion under Fed. R. Civ. P. 60(b)(6) to vacate a final judgment for "any * * * reason justifying relief." Rule 60(b)(6) permits a court to vacate a judgment "whenever such action is appropriate to accomplish justice." *Klapprott* v. *United States,* 335 U.S. 601, 614-615 (1949) (opinion of Black, J.). The district court did not abuse its discretion in taking such action here, in light of the court of appeals' prior holding that the allottees' motion to intervene after judgment was timely; the apparent absence of notice to the allottees prior to the entry of judgment; and the fact that the validity of the Area Director's rule was not actually litigated, but rather was the subject of a stipulation and consent decree. Compare *Kneeland* v. *Luce,* 141 U.S. 437 (1891).

2. Petitioner also contends (Pet. 10-14) that the court of appeals' affirmance of the district court's order vacating the injunctions is inconsistent with this Court's decisions

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rendered after the adoption of Rule 24 have also precluded the intervenors from challenging prior orders, the omission of the relevant language from Rule 24 surely weighs against the *absolute* rule petitioner urges, under which a court would never have the power to vacate a prior order at the behest of an intervenor. Moreover, in *Galbreath,* the only relevant court of appeals decision cited by petitioner, the court of appeals did recite the principle upon which petitioner relies (134 F.2d at 570); but the actual holding of the case was that the appellant-intervenor did not have a justiciable interest in the controversy (*id.* at 574).

Other cases cited by petitioner have no relevance here. See *Siebring* v. *Hansen,* 346 F.2d 474 (8th Cir.), cert. denied, 382 U.S. 943 (1965) (nonparty to patent infringement suit, who intervened in a contempt proceeding instituted against the losing party, could not attack the underlying judgment because its validity was not at issue in contempt proceedings); *Godfrey L. Cabot, Inc.* v. *Binney & Smith Co.,* 46 F. Supp. 346 (D.N.J. 1942) (intervenor's suit considered to have been commenced as of the date of the original action for purposes of determining which of two concurrent suits should be stayed pending the outcome of the other).

in *Arizona* v. *California*, 460 U.S. 605 (1983), and *Nevada* v. *United States*, 463 U.S. 110 (1983). Those cases, however, do not suggest that a court may never grant an Indian's timely motion to intervene in litigation and then permit him to challenge a prior order in the case. There is no reason why Indians should be uniquely disabled in this manner from requesting relief that is otherwise available under Fed. R. Civ. P. 60(b).

In *Arizona* v. *California*, the Court held that Indian tribes for whose benefit the United States held reserved water rights were entitled to intervene in an original action in this Court to adjudicate rights to the waters of the Colorado River. 460 U.S. at 613-615. However, the Court held that, in light of the strong interest in repose, neither the United States nor the tribes were entitled to reopen the question of the amount of practicably irrigable acreage that had been decided by the Court in a decree entered almost 20 years earlier. *Id.* at 615-628. The Court noted that the absence of the tribes as parties at the time of the prior proceedings did not authorize them to relitigate that issue, because the United States, as their fiduciary, had full authority to present the reserved water right claims on their behalf and to bind them in the litigation. The Court specifically found no merit to the contention that the United States' representation of the Indians' interests on the prior occasion was inadequate (*id.* at 627-628), since the government won a "complete victory" for them (*id.* at 617), and that the issues had been thoroughly litigated in the prior proceedings (*id.* at 609-610, 616-617).

This case differs from *Arizona* v. *California* in several critical respects. First, the allotees in this case moved to intervene not many years after the entry of the prior decree, but rather only 33 days after judgment, before the time for taking an appeal had even expired. Second, the court below found on the prior appeal, in a ruling that petitioner does not challenge, that the allottees had made the requisite

showing under Rule 24(a) that their interests with respect to the very issues in dispute may not have been adequately represented by the government (Pet. App. 23a-24a). Third, there was no actual litigation of the critical issues involved in this case, because the government conceded that the Area Director's policy was unlawful and consented to the entry of an injunction against its application (*id.* at 7a).

Petitioner's reliance on *Nevada* v. *United States* is equally misplaced. There, as in *Arizona* v. *California*, the tribe sought to reopen a decree that had been entered many years earlier. Moreover, in *Nevada* v. *United States*, there had been protracted litigation and extended settlement discussions concerning the water rights, and the government affirmatively advanced the interests of the Indians in those endeavors. See 463 U.S. at 117-118. Indeed, the Court cited the district court's finding in that case that the United States had intended on the prior occasion "to assert as large a water right as possible for the Indian reservation" (*id.* at 120), and the Court rejected the notion that the government's representation was inadequate simply because of the conflicting responsibilities imposed on the government in such litigation (*id.* at 128, 135-138 n.15). By contrast, this is not a case in which the United States affirmatively presented claims on behalf of the Indians in prior litigation and in which such claims are now alleged in later proceedings to have been insufficient. The government is the defendant in this suit brought by petitioner, and the government did not present claims on behalf of the Indians or actually litigate the validity of the challenged action; rather, the government stipulated to its illegality.[4] In these circumstances, *Nevada* v. *United States*

[4] The mere fact that circumstances warrant the allottees' intervention to present arguments not advanced by the federal defendants does not establish an actionable breach of fiduciary duty, so long as the government made a reasonable, good-faith determination not to

did not bar the district court's order vacating its prior judgment at the behest of Indians who intervened in a concededly timely manner and prior to the expiration of the time for appealing that judgment.[5]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1986

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contest petitioner's allegations. See *United States* v. *Mason*, 412 U.S. 391 (1973).

[5] Petitioner's reliance (Pet. 8-10) on *Heckman* v. *United States*, 224 U.S. 413 (1912), is misplaced for similar reasons. There, the United States brought suit to cancel the conveyance of allotments by Indians in violation of restrictions against alienation, and the grantee-defendants contended that the United States was required to join the Indian grantees as parties in order to prevent the possibility that the defendants would be subject to inconsistent judgments. The Court rejected the contention that the United States' representation of the Indians was incomplete or inadequate and that the Indians therefore were necessary parties. 224 U.S. at 444-446. *Heckman* does not address the distinct question of when relief may be granted to the affected Indians if they intervene in a timely manner in the suit to which the government is a party and make a particularized showing of inadequate representation.

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No. 86-634

In The Supreme Court of The United States

OCTOBER TERM, 1986

SANGUINE, LTD.,
Petitioner,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner, Sanguine, Ltd., submits this brief in reply to arguments raised in the briefs of the respondents.

ARGUMENT

THE DECISION BELOW IS CONTRARY TO THE PLAIN HOLDINGS OF THIS COURT.

The argument raised by all intervenor respondents in opposition to this Court's granting of the Petition for Writ of Certiorari is that this Court's prior holdings are distinguishable from the instant case because in the prior cases relied upon by Sanguine, Ltd., the government's representation of the Indian intervenors was adequate. *But see Nevada v. United States,* 463 U.S. 110 (1983); *Arizona v. California,* 460 U.S. 605 (1983). *See also Heckman v. United States,* 224 U.S. 413 (1912). The court of appeals reached the same conclusion. *Sanguine, Ltd. v. United States Department of Interior,* 798 F.2d 389, 391 (10th Cir. 1986). The erroneous effort of the respondents and of the court of appeals to distinguish this case from this Court's prior rulings is precisely the reason why certiorari should be granted.

In *Nevada v. United States, supra,* the Court expressly declined to "pass judgment on the quality of representation that the Tribe received," noting, however, that the government had paid $8,000,000.00 in settlement of the Tribe's claim of inadequate representation. 463 U.S. at 135 n.14. Moreover, the Court held, "If in carrying out their role as representative, the Government *violated its obligations to the Tribe,* then the Tribe's remedy is against the Government, not against third parties." *Id.* at 144 n.16 (italics supplied). It is thus not possible to distinguish this case from *Nevada v. United States* upon the grounds that the restricted Indians assert that the representation of the United States

was not adequate.[1]

In *Arizona v. California, supra,* the Court's decision not to permit a relitigation of prior interlocutory decrees also revolved not around the *adequacy* of the government's representation,[2] but the *fact* of government representation. The Court relied upon its long-standing decision in *Heckman v. United States, supra,* in support of its holding that the government had full authority to bind the Indians in litigation. The holding of *Heckman* was not that the Indians would be bound by "adequate" government representation, but that the Indians would be absolutely bound by government representation.[3]

Thus, the present case is not "unique" and is not distinguishable from this Court's prior decisions, as respondents have claimed (Intervenor Resp. Br. at 5). To the contrary, the court of appeals has simply rejected the direct holdings of the Court and, in doing so, has threatened the finality and effect of every judgment entered in the Tenth

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[1] *Nevada v. United States* also supplies the authority with which to reject intervenors' assertion that the claimed inadequacy of representation by the United States deprived them of due process. "[T]he Tribe, *through the Government* as their representative, was given adequate notice and a full and fair *opportunity* to be heard." *Ibid.* (italics supplied).

[2] The Court could find no evidence to support the Tribes' argument that the government representation was legally inadequate. 460 U.S. at 627. The Court did suggest that if the government's representation *was* inadequate, the Tribe's remedy, if any, would lie against the government. *Id.* at 627 n.20.

[3] The court of appeals does not even attempt to distinguish the Court's holding in *Heckman.*

Circuit in which it can be simply *alleged* that the United States did not afford adequate representation of restricted Indian interests. It should be emphasized that no finding of inadequate representation has been made in this case. The district court concluded that the representation *had* been adequate (App. F at 30a-31a); the court of appeals held that a *potential* of inadequacy is a basis for permitting post-judgment intervention *and* vacation of the pre-intervention decrees (App. E at 23a-24a).

The government respondents suggest that restricted Indians should not be "uniquely disabled" from relitigating final decrees entered against the government in its capacity as trustee of Indian lands (Federal Resp. Br. at 11). It should be noted that there is nothing "unique" in prohibiting post-judgment intervenors from relitigating prior decrees. It is the normal and long-standing rule that post-judgment intervenors may *not* seek to relitigate prior decrees. *See United States v. California Co-operative Canneries,* 279 U.S. 553 (1929). *See also* Pet. Br. at 14-16. Moreover, this Court in its decision in *Heckman v. United States, supra,* has held expressly that restricted Indians may not relitigate decrees entered against the government in its representation in litigation over trust lands.[4] The reasoning of *Heckman*

[4] *Heckman v. United States,* 224 U.S. at 446 ("And it could not, consistently with any principle, be tolerated that . . . these wards should themselves be permitted to relitigate the question"). *Accord, Arizona v. California, supra,* 460 U.S. at 627; *Nevada v. United States, supra,* 463 U.S. at 144.

is even more compelling in the instant case than in the context of a dispute over title to particular parcels of Indian lands. In the instant case, the litigated issue involved the government's power to adopt and enforce a rule of general applicability concerning the required content of communitization agreements submitted for government approval. It would seem beyond reasonable dispute that the government has authority to litigate and settle disputes concerning its own rulemaking authority in the administration of federal land management statutes.[5]

The government respondents further argue that, since the intervenor respondents moved to intervene within the time for bringing an appeal from the district court's judgment, the intervenors should be permitted to relitigate all

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[5] The government further argues that the proceedings in the district court did not amount to actual litigation. (Federal Resp. Br. at 10). This argument is without merit. The government did not consent to the entry of judgment until after the district court had conducted a hearing and had determined that petitioner was likely to succeed on the merits. Respondents do not suggest that the government and petitioner colluded to deprive the intervenors of any legal rights. A consent decree, as was entered in this case after the district court preliminarily enjoined the government from enforcing the invalid rule, is itself a judicial act possessing the full force and effect of any other final decree. *Siebring v. Hansen,* 346 F.2d 474 (8th Cir. 1965).

The court of appeals and the respondents have repeatedly relied upon the fact that a consent decree was entered as evidence of inadequate representation by the government. This court has held, however, that the fact that an action has been settled is *not* a proper basis for concluding that representation was inadequate. *See Sam Fox Publishing Co. v. United States,* 366 U.S. 683, 689 (1961). *See also United States v. Associated Milk Producers, Inc.,* 534 F.2d 113 (8th Cir. 1976), *cert denied,* 429 U.S. 940 (1977); *United States v. Board of School Commissioners,* 466 F.2d 573 (7th Cir. 1972), *cert. denied,* 410 U.S. 909 (1973); *Washington v. Keller,* 479 F. Supp. 569 (D. Md. 1979).

aspects of the judgment in the district court (Federal Resp. Br. at 8-9). The intervenor respondents may have had the right, upon intervention, to appeal the legal basis for the final judgment entered by the district court.[6] The holdings of *Heckman v. United States, supra,* and *Nevada v. United States, supra,* do not expressly prohibit such appeals. This Court's decisions do, however, expressly preclude intervention by restricted Indians for the purpose of vacating and relitigating decrees entered against the government in its representative capacity. To hold otherwise would require a person aggrieved by a government rule for the management of Indian trust lands to join as defendants the hundreds or thousands of Indians potentially affected by the rule in order to achieve a final resolution of his claim. The government's authority to litigate the validity of rules promulgated for the benefit of restricted Indians would thus be eliminated for all practical purposes. The rule of *Heckman* is not a rule of judicial economy, but a rule recognizing the government's authority and duty to represent the interests of restricted

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[6] Even if the first decision of the court of appeals (App. F) was correct under this analysis, the second decision of the court of appeals (App. A) was erroneous. After the court of appeals reversed the order of the district court denying intervention, the only course the intervenors would have been permitted to take would have been to appeal the legal conclusions reached by the district court in its final decree (App. G). The intervenors expressly waived any right to appeal after intervention, choosing instead to bring a claim against the government for inadequate representation. *See* Transcript of Proceedings in the District Court had on March 28, 1985, at 31-32.

Indians in adversarial proceedings.[7]

CONCLUSION

Petitioner, Sanguine, Ltd., respectfully requests the Court to grant its writ of certiorari and to review the judgment and decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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[7] The government's suggestion that no harm would be suffered by petitioner should the Court decline to review the judgment of the court of appeals is disingenuous. Petitioner seeks to avoid the complete relitigation of a final decree. This Court's ability to grant effective relief to petitioner from the decision of the court of appeals, which permits a relitigation of the final decree, will be effectively destroyed if a complete relitigation is permitted at this stage of the proceedings. Moreover, refusal of the court of appeals to maintain the validity of the consent decree may have the "serious, perhaps irreparable, consequence" of upsetting the finality of the decree. *See Carson v. American Brands, Inc.*, 450 U.S. 79, 87-88 (1981) (holding that an order refusing to enter a consent decree was appealable as of right to the court of appeals).

CERTIFICATE OF SERVICE

I hereby certify that this Petitioner's Reply Brief in Support of Petition for Writ of Certiorari was served upon the parties hereto this 5th day of January, 1987, by depositing three copies in the United States mails, with first-class postage prepaid, addressed as follows:

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